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SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1964

No. 38

CITY OF EL PASO, APPELLANT,

vs.

GREENBERRY SIMMONS.

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FILED FEBRUARY 25, 1964
PROBABLE JURISDICTION NOTED APRIL 20, 1964

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APPELLANT'S AMENDED DESIGNATION (LETTER) AS TO PRINTING RECORD.

Filed Jul. 6, 1962.

Greenberry Simmons
Attorney at Law
Kentucky Home Life Building
Louisville 2, Kentucky

July 5, 1962

Honorable Edward W. Wadsworth
Clerk, U. S. Court of Appeals
P. O. Box 30120
New Orleans 30, Louisiana

Re: Greenberry Simmons vs. City of El Paso—No. 19754.

Dear Mr. Wadsworth:

In appellant's Designation of Contents of Record on appeal sent to you previously we designated that all the record be printed. Please do not print the three briefs which came up with all of the original papers. The District Court Docket Numbers are (9), (12), (13). No. (9), Plaintiff's Brief, was printed for the District Court.

You will also put plaintiff's exhibits in the record in only one place so as to dispense with duplication. Please put these exhibits in under Plaintiff's Motion

for Summary Judgment No. (7) of the docket rather than in any other place found in the original papers.

Sincerely yours,

GREENBERRY SIMMONS,
(Greenberry Simmons),
Attorney for Appellant.

cc: Harold S. Long
Caples Building
El Paso, Texas

I, Greenberry Simmons, certify that I have this 5th day of July, 1962 mailed a copy of this Amended Designation to Mr. William J. Mounce, El Paso Natural Gas Buildino, bexl Paso, Texas, Attorney of Record for the Defendant and Appellee, City of El Paso.

GREENBERRY SIMMONS.
(Greenberry Simmons).

Civil Docket 2334.

Title of Case.

Greenberry Simmons,
vs.
City of El Paso.

Basis of Action: Suit to clear title to real estate.

Jury Trial Claimed: .....

On .....

Attorneys;

For Plaintiff: Harold S. Long, 415 Caples Bldg., El Paso, Tex.

For Defendants: Hardie, Grambling, Sims & Galatzan.

Date	Plaintiff's Account	Received	Disbursed
8-31-61	Harold S. Long	15.00	
9-1 -61	Transfer U. S. Treas. Fees		15.00

Date		Filings—Proceedings
8-31-61	(1)	Filed Complaint in duplicate.
8-31-61		Issued summons and copy.
9- 6-61	(2)	Filed Return Summons exe. 9-1-61.
9-22-61	(3)	Answer of City of El Paso in dup.
10- 5-6	(4)	Plaintiff's Request for Admissions by Defendant.
11-16-61	(5)	Filed Response to Request for Admission in dup.
12-22-61	(6)	Filed Defendant's Motion for Summary Judgment, in dup.
12-27-61	(7)	Filed Plaintiff's Motion for Summary Judgment.
12-27-61	(8)	Filed Plaintiff's Exhibits 32A-32G (in the vault).
1-15-61	(9)	Filed Brief for Plaintiff on Plaintiff's Motion for Summary Judgment, in dup.
1-15-62	(10)	Filed Certificate showing 2 copies of above brief mailed to Morris A. Galatzan, Attorney for Defendant.
3-16-62	(11)	Filed Defendant's First Amended Answer in dup.
3-16-62	(12)	Filed Memorandum in Support of Defendant's Motion for Summary Judgment.
3-27-62	(13)	Filed Plaintiff's Supplemental Brief in Reply to Defendant's Brief on Motion for Summary Judgment, in dup.
3-27-62	(14)	Filed Affidavit, in dup.
5-18-62	(15)	Filed Motion and Petition of Plaintiff for Rehearing in dup.

Date	Filings—Proceedings
5-18-62 (16)	Filed Summary Judgment for defendant City of El Paso 9/571.
5-21-62	Notices mailed to counsel.
5-21-62 (17)	Filed Order Denying Motion and Petition of Plaintiff for Rehearing. 9/576.
5-22-62	Notices of above order mailed to counsel.
5-22-62 (18)	Filed Appeal Bond for the sum of $250.00.
5-22-62 (19)	Filed Notice of Appeal in dup.

A true copy of the original, I certify.

MAXEY HART,
Clerk.

(Seal)

By PAULINE G. SILVERS,
Deputy.

COMPLAINT.

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF TEXAS, AT EL PASO, TEXAS.

GREENBERRY SIMMONS,

Plaintiff,

versus

CITY OF EL PASO,

Defendant.

2334—Civil Action.

1. Plaintiff is a Citizen of the State of Kentucky and defendant is a Municipal Corporation incorporated under the laws of Texas. The matter in con-

troversy exceeds, exclusive of interest and costs, the sum of ten thousand ($10,000) dollars.

2. Jurisdiction is further founded on Title 28 United States Code, Section 1655 (62 Statute 944) involving the question of title to real estate located within this District.

3. Plaintiff is the owner of the following described real estate located in El Paso County, Texas known as:

North half, survey 240, Nellie D. Mundy, Scrap File 7219, containing 328.65 acres.

Survey 235, Laura E. Mundy, Scrap File 7230, containing 292 acres.

4. Defendant, City of El Paso, A Municipal Corporation, claims an estate or interest in and to the land adverse to the plaintiff, and the claims of defendant are without any rights whatever, and the defendant has no estate, right, title or interest in the land or premises or any part thereof.

Wherefore, plaintiff Prays:

(1) That the defendant be required to set forth the nature of its claim, and that all adverse claims of the defendant may be determined by the judgment of this Court.

(2) That by judgment it be declared and adjudged that the defendant have no estate or interest whatsoever in, or to said land or premises, or in or to

any part thereof, and that the title of the plaintiff is good and valid.

(3) That the defendant be forever enjoined and debarred from asserting any claim whatever in or to the land or premises, or to any part thereof, adverse to the plaintiff and for such other and further relief as this Court shall deem agreeable and for his costs of this action.

HAROLD S. LONG,
(Harold S. Long),

415 Caples Bldg.,
El Paso, Texas.

GREENBERRY SIMMONS,
(Greenberry Simmons),
Attorneys for Plaintiff.

Kentucky Home Life Bldg.,
Louisville 2, Kentucky.

SUMMONS.

Received Sep. 1, 1961.

United States District Court for the Western District of Texas, El Paso Division.

Greenberry Simmons, Plaintiff,

vs.

CITY OF EL PASO,

Defendant.

Civil Action File No. 2334.

To the above named Defendant:

You are hereby summoned and required to serve upon Harold S. Long, plaintiff's attorney, whose address is 415 Caples Building, El Paso, Texas, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

MAXEY HART,
Clerk of Court,
JESSE J. SAXON,
Deputy Clerk.

(Seal)
(Seal of Court)

Date: August 31, 1961.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

Return on Service of Writ.

I hereby certify and return, that on the 1 day of September 1961, at El Paso, Texas I received this summons and served it together with the complaint herein as follows: On September 1, 1961, by serving the City of El Paso by delivering a copy of this writ together with a copy of complaint attached, to Mr. Ralph Seitsinger, Mayor of El Paso in person, at the City Hall, El Paso, Texas.

ALBERT W. SAEGERT,
United States Marshal,
By JACK M. GRAVES,
(Jack M. Graves),
Deputy United States Marshal.

Marshal's Fees	
Travel	$ 0
Service	$2.00
Total	$2.00

Subscribed and sworn to before me, a..... this ..... day of ....., 19.....

(Seal).

Note.—Affidavit required only if service is made by a person other than a United States Marshal or his Deputy.

DEFENDANT'S ANSWER.

Filed Sep. 22, 1961.

(Title Omitted.)

Comes now, Defendant, City of El Paso, and for answer states:

I.

Defendant admits the allegations contained in Paragraph 1 of Plaintiff's Complaint.

II.

In reply to Paragraph 2 of Plaintiff's Complaint, Defendant states that it is without sufficient information or knowledge to form a belief as to the truth of the allegations contained therein, and therefore denies same and demands strict proof thereof.

III.

Defendant denies all the allegations contained in Paragraph 3 of Plaintiff's Complaint.

IV.

In reply to Paragraph 4 of Plaintiff's Complaint, Defendant admits that it claims an estate, or interest, in the land in question, but denies all other allegations contained therein.

V.

Defendant denies that Plaintiff is entitled to any of the relief prayed for in his Complaint.

Answer By Way Of New Matter.

VI.

Defendant states that on November 14, 1955, the General Land Commissioner awarded, without condition of settlement, the North Half (N/2) of Survey 240, SF 7219, Nellie D. Mundy Survey, consisting of 328.65 acres of land in El Paso County, Texas, to the Public Service Board, City of El Paso. On January 26, 1956, said land was patented from the State of Texas to the Public Service Board, City of El Paso, by Patent No. 492, Volume 25-B, Abstract No. 10,078, with all minerals reserved to the State of Texas.

Defendant further states that on November 14, 1955, the General Land Commissioner awarded, without condition of settlement, Section 235, SF 7230, Laura E. Mundy Survey, consisting of 292 acres of land in El Paso County, Texas, to the Public Service Board, City of El Paso. On January 16, 1956, said section was patented from the State of Texas to the Public Service Board, City of El Paso, by Patent No. 491, Volume 25-B, Abstract No. 10,077, with all minerals reserved to the State of Texas.

Since acquiring the lands described hereinabove, Defendant has not conveyed fee title to same.

First Defense.

VII.

Any claim Plaintiff may have had in and to the lands in question is barred by the provisions of Article 5329, Vernon's Annotated Texas Statutes (1925 Compilation).

Second Defense.

VIII.

Defendant has been in open, notorious, continuous, peaceable possession of the lands in question, under title, claiming same against the world for more than three years; consequently, any claim Plaintiff may have had in and to said lands is barred by virtue of Article 5507, Vernon's Annotated Texas Statutes (1925 Compilation).

Third Defense.

IX.

Defendant has been in open, notorious, continuous, peaceable possession of the lands in question, under title, claiming same against the world for more than five years; consequently, any claim Plaintiff may have had in and to said lands is barred by virtue of Article 5509, Vernon's Annotated Texas Statutes (1925 Compilation).

Fourth Defense.

X.

The lands in controversy were forfeited to the State of Texas on July 21, 1947, for non-payment of interest. There have been no adverse claims or suits filed contesting title to such lands since the date of such forfeiture, until the date Plaintiff filed his suit. During the interim fifteen-year period, intervening rights have attached to the lands in question; therefore, Plaintiff should be estopped from asserting any claim to said lands by virtue of the Doctrine of Laches.

Wherefore, premises considered, Defendant prays that Plaintiff's claim for relief be denied, that Defendant be allowed to go hence without day and with its costs.

Respectfully submitted,
HARDIE, GRAMBLING, SIMS & GALATZAN,
By MORRIS A. GALATZAN,
(Morris A. Galatzan).

I certify that I have, this 22nd day of September, 1961, mailed a copy of this Answer to Mr. Harold S. Long, 415 Caples Building, El Paso, Texas, Attorney of record for Plaintiff.

MORRIS A. GALATZAN.

REQUEST FOR ADMISSION.

Filed Oct. 5, 1961.

(Title Omitted.)

To: Mr. Morris A. Galatzan,
Attorney for Defendants.

Please take notice that the plaintiff hereby requests you, pursuant to the provisions of Rule 36 of the Federal Rules of Civil Procedure, to admit, within 10 days after service upon you of this Request, for the purpose of the above-entitled action only, and subject to all pertinent objections to admissibility which may be interposed at the trial, the genuineness of the original documents and official records herewith exhibited to you a duplicate list of these Certified Copies are given to you marked Exhibits 1 to Exhibits 33-A. If you care to see the Certified Copies which will be introduced into Court, they may be observed at the office of the Attorney for the plaintiff. These originally filed official records substantiate the title of the plaintiff on which this action is founded.

The plaintiff also requests you to admit within the time stated above that all the official records annexed to this request and marked Exhibits 23 to 33-A, which are copies of letters, applications for reinstatement of land, and checks for payment of interest sent by the plaintiff to the Commissioner of the General Land Office and stamped received in his office and later returned to this plaintiff by him by letter referring to same, are true copies of such let-

ters, such applications to reinstate land, and such checks for payment of interest.

(Signed) HAROLD S. LONG,
(Harold S. Long),
Caples Bldg.,
El Paso, Texas.

GREENBERRY SIMMONS,
(Greenberry Simmons),
Plaintiff's Attorneys.
Ky. Home Life Bldg.,
Louisville 2, Ky.

Date October 5, 1961.

I certify that I have, this 5th day of October, 1961, mailed a copy of this Request For Admission to Mr. Morris A. Galatzan, El Paso Natural Gas Bldg., El Paso, Texas, Attorney of record for Defendant.

HAROLD S. LONG,
(Harold S. Long).

Plaintiff's Exhibit Nos.:

1. Application of W. H. Glenn to State for Purchase, "For Land As Additional To Home Tract", including Award, signature of Com. Jan. 29, 1910, awarded April 30, 1910 (Land Office).

2. Certificate of three years occupation issued under prior law May 10, 1913 #10189 (Land Office).

3. Warranty Deed W. H. Glenn to Lee H. Orndorff, June 12, 1913. Vol. 23. p. 150 County Clerk's Office of El Paso County, Texas.

4. Warranty Deed Lee H. Orndorff and M. H. Barrough grantors to B. G. Heineman, grantee, for whole section #240 Nellie D. Mundy, dated June 17, 1941 recorded Vol. 694, p. 373, County Clerk's Office, El Paso County, Texas.

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6. Letter of D. G. Heineman to Bascom Giles, General Land Office Commissioner dated Feb. 25, 1943, paid part interest on Survey 235 and promising to pay March 15, 1943, on N/2 Survey 240, N. D. Mundy.

To avoid duplication see exhibit #24.

7. Letter from Bascom Giles, Commissioner of General Land Office, dated May 1, 1947, stating that interest of $262.82 is due and to avoid forfeiture on July 1, 1947 it must be paid addressed to D. G. Heinman Estate.

8. Letter from Commissioner of General Land Office dated July 22, 1947 to D. G. Heinman Estate saying "This is to advise you that the above acreage was forfeited on the records as of July 21, 1947, for nonpayment of interest" marked "Returned unclaimed", never delivered.

9. Certificate by Land Commissioner that no grazing lease was on land involved during year of 1952.

To avoid duplication—Exhibits 10-15. See Exhibits 28-33-A.

10. Deed from Tella H. Heineman, individually and as heir to D. G. Heineman, deceased grantor to Greenberry Simmons dated June 10, 1952 recorded in the County Clerk office of El Paso County July 14, 1952, records of said County in Volume 1077, p. 540 covering survey N/2 240 Nellie D. Mundy containing 328.65 acres; survey 235, Laura E. Mundy, containing 292 acres.

11. Affidavit of heirship of Tella H. Heineman.

12. Deed D. H. Heineman to Greenberry Simmons.

13. Heirship affidavit of D. H. Heineman.

14. Certified copy of letter from Land Office July 24, 1952 to Greenberry Simmons.

14-A. See Exhibits 32-A-32H (32-A same as 14-A).

14-B. See Exhibits 32-A-32-H (32-B same as 14-B).

14-C. See Exhibits 32-A-32-H (32-C same as 14-C).

15. Certified copy of letter from acting Commissioner Wallace September 6, 1952 to Simmons.

16. Application of John B. Kilpatrick to State for purchase, "For land as Additional To Home Tract", including Award, signature of Com. Jan. 29, 1910, awarded April 30, 1910 (Land Office).

17. Certificate of three years occupation issued under prior law May 21, 1913 as recorded in the County Clerk's Office of El Paso County, Vol. 235, p. 71. (Kilpatrick).

18. The will of John B. Kilpatrick bequeathing all of his property to his sister, Margaret Bobodilla, filed Feb. 12, 1929.

19. Order of probate of Kilpatrick's will March 29, 1929.

20. Royalty or mineral deed from Bobodilla to Heineman August 14, 1931.

21. Deed from Bobodilla to L. H. Brandt December 16, 1931, 1/4 undivided interest.

22. Deed from Bobodilla to D. G. Heineman dated July 21, 1941 for 1/2 undivided interest recorded in the County Clerk's Office of El Paso County, Volume 868, p. 575.

23. Duplicate receipts from the General Land Office dated September 2, 1941 and February 26, 1943 for interest paid by D. G. Heineman. (Nos. 23-A-23-B, Heineman; Nos. 23-C-24-D, Bobodilla).

24. Letter of D. G. Heineman to the Commissioner of the General Land Office dated Feb. 25, 1943 paying $37.97 interest.

25. Letter from Bascom Giles, Commissioner of General Land Office dated May 1, 1947 stating that

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30. Deed D. H. Heineman to Greenberry Simmons.

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32-A. Copy of Exhibit 14 signed by Land Commissioner Giles sent to plaintiff dated July 24, 1952, returning 3 applications to reinstate forfeited land and 4 checks for all interest due on forfeited lands.

32-B. Application of plaintiff to reinstate forfeited Survey #N/2 240, stamped by General Land office as follows "Received, July 23, 1952, General Land office" with General Land office number stamped on it 43325.

32-C. Check payable to General Land office signed by Breenberry Simmons, for interest on N/2 240 dated 7-18-52, for $430.10, stamped with General Land office #43325 same number as is stamped on application to reinstate this land.

32-D. Application of plaintiff to reinstate forfeited Survey 235, subscribed and sworn to before the deputy county clerk on July 17, 1952, stamped, "Received July 23, 1952, General Land Office" #43326.

32-E. Check dated 7-18-52 payable to General Land Office for $252.02 for interest for reinstatment of Survey 235, signed by Greenberry Simmons and stamped in upper right hand corner with General Land Office number same as on the application #43326.

32-F. Application of Greenberry Simmons to reinstate Sec. 24, Blk. 70, Tsp 1, T & PRR, grantee, stamped on back "Received Jul. 19, 1952 General Land Office" with 2 numbers stamped 42927, 42928.

32-G. Checks dated 7-16-52 payable to General Land Office for $1158.11 for reinstatement of Sec. 24 etc. interest, stamped in upper right hand corner #42927 signed by Greenberry Simmons. #42927 same as stamped by Land Office on application to reinstate forfeited land.

32-H. Check duplicated—it was damaged in the 3rd duplication process. The damaged check is available for inspection, dated 7-16-52 payable to General Land Office; the amount was left blank, it was for Bal due on reinstatement of Sec, 24, etc., for interest, signed by Greenberry Simmons. Stamped in upper Rt. Con., Land Office #42928.

33. Certified copy of letter from acting Commissioner Wallace September 6, 1952 to Simmons.

33-A. Original Copy of the Certified Copy of Plaintiffs Exhibit #33, signed by acting Land Commissioner Wallace and received by plaintiff, saying "If you are satisfied with your title as recorded in the County Clerk's office of Hudspeth County, you should have no fear or worry"; dated September 6, 1952.

Omitted herewith from the printed record the same being hereinafter copied at page 43 thru 126 Incl.

* * * * * * * *

RESPONSE TO REQUEST FOR ADMISSION.

Filed Nov. 16, 1961.

(Title Omitted.)

Comes now, the Defendant, City Of El Paso, in response to Plaintiff's Request for Admission heretofore filed on October 5, 1961, and admits the genuineness of all documents and instruments marked Ex-

hibits 1 through Exhibits 33-A, Except However, the following:

1. Exhibit 32-B, which purports to be an application for reinstatement covering the N/2 of Survey 240.

2. Exhibit 32-C, which purports to be a check in the amount of $430.11.

3. Exhibit 32-D, which purports to be an applicaton for reinstatement covering Survey 235.

4. Exhibit 32-E, which purports to be a check in the amount of $251.02.

5. Exhibit 32-F, which purports to be an application for reinstatement covering Section 24, Block 70, Township 1, Hudspeth County, Texas.

6. Exhibit 32-G, which purports to be a check in the amount of $1,158.11.

7. Exhibit 32-H, which purports to be a check signed with the amount left blank.

As to Exhibits 32-B to 32-H, inclusive, this Defendant is without sufficient information or knowledge to either admit or deny the genuineness of said documents; consequently, Defendant respectfully denies same and demands strict proof thereof.

I, William J. Mounce, do solemnly swear that I am one of the attorneys for the Defendant, City Of El Paso, that I have read and understand the fore-

going response, and that the matters and allegations set forth therein are true and correct to the best of my knowledge and belief.

WM. J. MOUNCE.

Subscribed And Sworn To Before Me, by the said William J. Mounce, this 13th day of November, 1961, to certify which witness my hand and seal of office.

ROBERTA M. JONES,
(Seal) Notary Public, El Paso County, Texas.

Respectfully submitted,
HARDIE, GRAMBLING, SIMS & GALATZAN,
By WM. J. MOUNCE,
Attorneys for Defendant, City Of El Paso.

I, William J. Mounce, certify that I have this 13th dav of November, 1961, mailed a copy of this pleading to Mr. Harold S. Long, Caples Building, El Paso, Texas, Attorney of Record for Plaintiff.

WM. J. MOUNCE.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

(Title Omitted.)

Comes now the Defendant, City Of El Paso, and moves the Court for a Summary Judgment in its favor against the Plaintiff, upon the issues tendered by Plaintiff's Complaint, and the Defendant's An-

swer thereto, and as grounds for said Motion, Defendant would show the Court that the pleadings on file herein, those certain documents filed by Plaintiff which Defendant has admitted as being genuine, together with the Affidavits of Morris A. Galatzan and E. J. Umbenhauer, attached hereto and made a part hereof, show that there is no genuine issue as to any material fact as between the Plaintiff and Defendant, and that Defendant is entitled to Judgment as a matter of law.

Respectfully submitted,
HARDIE, GRAMBLING, SIMS & GALATZAN,
By WM. J. MOUNCE,
(William J. Mounce),
Attorneys for Defendant,
City of El Paso.

I, William J. Mounce, certify that I have mailed a copy of this motion to Mr. Harold Long, attorney for Plaintiff, this 22nd day of December, 1961.
WM. J. MOUNCE.

United States District Court for the Western District of Texas, El Paso Division.

Greenberry Simmons, Plaintiff,
vs. Civil Action No. 2334.
City of El Paso, Defendant.

Affidavit.

Before Me, the undersigned authority, on this day personally appeared Morris A. Galatzan, known by

me to be a credible person, who, having been duly sworn, upon his oath deposes and says:

My name is Morris A. Galatzan, and I am one of the attorneys for the Public Service Board of the City of El Paso. Attached hereto and made a part hereof is a copy of a Certificate of Facts, dated September 15, 1961, prepared and certified to by the General Land Office of the State of Texas, pertaining to the North Half (N/2) of Survey 240, S. F. 7219, Nellie D. Mundy, containing 328.65 acres, and Survey 235, S. F. 7230, Laura E. Mundy, containing 292 acres, both parcels being situated in El Paso County, Texas.

Further deponent sayeth not.

MORRIS A. GALATZAN,
(Morris A. Galatzan).

Subscribed And Sworn To on this 11th day of December, 1961, by the said Morris A. Galatzan.

BETTY J. SHANG,
(Seal) Notary Public, El Paso County, Texas.

General Land Office
Austin 14, Texas

Jerry Sadler
Commissioner

September 15, 1961

I, Jerry Sadler, Commissioner of the General Land Office of the State of Texas, do hereby certify that

the papers, records and documents of said office show:

That Section 240, SF 7219, Nellie D. Mundy, 640 acres in El Paso County, was awarded April 30, 1910 to W. H. Glenn on application filed in the Land Office January 29, 1910 to purchase same at $1.50 per acre as additional land to home on Section 239, same grantee and county, and said Section 240 having been classified as Mineral and Dry Grazing and appraised at $1.25 per acre;

That on May 3, 1913, W. H. Glenn made the required proof of occupancy on said Home Section 239, and said proof was filed in the Land Office May 5, 1913, and Certificate of Occupancy No. 10189 issued thereon May 11, 1913;

That by corrected field notes made under survey of September 9th, to October 17, 1922, by J. W. Carter, County Surveyor of El Paso County the acreage of said Survey 240 was corrected from 640 acres to 657.3 acres, and said field notes were filed in the Land Office December 18, 1922 and approved on same date;

That W. H. Glenn and wife, Iva B. Glenn, conveyed the N/2 of said Section 240 and a 1/2 interest in and to the S/2 of said Section 240, with other land to Lee H. Orndorff by instrument dated June 12, 1913, and upon the filing of certified copy of said instrument in the Land Office August 15, 1930 said N/2 of said Section 240 containing 328.65 acres, was set up in a separate account leaving the S/2 of said Section 240, as containing 328.65 acres, standing on the

records of the Land Office in the name of W. H. Glenn and Lee Orndorff;

That the sale by the State of said N/2 of Section 240 was forfeited on July 21, 1947 for nonpayment of interest;

That the file pertaining to said forfeited sale contains no request for reinstatement nor any Treasury Receipt supporting such a request;

That on November 14, 1955, J. Earl Rudder, Land Commissioner awarded the N/2 of said Survey 240, to the Public Service Board, City of El Paso, under the provisions of Senate Bill 295, Acts of the 54th Legislature, Chapter 278, 1955, and payment in full was made in the General Land Office on January 16, 1956;

That the N/2 of Section 240 SF7219 as consisting of 328.65 acres in El Paso County was patented to the Public Service Board, City of El Paso, on January 26, 1956, by Patent No. 492, Volume 25-B, abstract 10078, with all minerals reserved to the State;

That said sale to the Public Service Board of the City of El Paso was made under School File No. 152973, the file wrapper of which bears the following indorsement: "Surface only sold";

* * * * * * * *

That on December 26, 1905, a survey was made for Laura E. Mundy under the provisions of Section 8 of an Act approved April 15, 1905 and an Act ap-

proved February 23, 1900, and field notes were compiled showing said survey to consist of 640 acres, designating same as Section 235 and being in El Paso County, which field notes were filed in the Land Office on January 18, 1906 and were subsequently canceled by corrected field notes;

That said Section 235, SF 7230, Laura E. Mundy Survey as consisting of 640 acres in El Paso County was awarded to Laura E. Mundy on June 1, 1906 upon her application filed in the Land Office May 18, 1906 to purchase same at $1.00 per acre under the classification of Mineral and Dry Grazing;

That the sale by the State of said Section 235, was forfeited on November 5, 1909 for failure to reside upon as required by law and for collusion in the purchase thereof;

That on September 27, 1928, W. L. Rider made a Surveyor's statement as to the method of his survey and corrected field notes on said Survey 235 and filed same in the Land Office October 1, 1928 where they were placed in Scrap File 7230;

That the said W. L. Rider resurveyed said Survey 235 on September 19, 1928, and compiled corrected field notes showing said survey to consist of 292 acres in El Paso County, which field notes were filed in the Land Office October 1, 1928 and were approved as correct on map of El Paso County for 292 acres on January 9, 1956, and which field notes bear the following indorsement: "Patented on January 26, 1956";

That said Section 235, Laura E. Mundy Survey consisting of as consisting of 292 acres in El Paso County and was awarded to John B. Kilpartick on April 30, 1910 upon his application filed in the Land Office January 29, 1910 to purchase same at the price of $1.50 per acre under the classification of Mineral and Dry Grazing as addition to his home tract on Survey 238, SF 233 in El Paso County;

That the sale by the State of said Section 235, John B. Kilpartick was forfeited on July 21, 1947 for nonpayment of interest;

That the file pertaining to said forfeited sale contains no request for reinstatement nor any Treasury Receipt supporting such a request;

That Bascom Giles, Land Commissioner, on May 10, 1954 awarded Prospect Permit No. 41858 to Dr. Lee F. Scarborough covering said Section 235 consisting of 292 acres, which application granted to Dr. Scarborough the right to prospect for metalic minerals and precious stones for a period not to exceed one year, and said Prospect Permit No. 41858 has expired and so stands upon the records of the General Land Office;

That on November 14, 1955, J. Earl Rudder, Land Commissioner, awarded said Section 235, SF 7230 as consisting of 292 acres in El Paso County to Public Service Board of the City of El Paso under the provisions of Senate Bill 295, acts of the 54th Legislature, 1955, Chapter 278, and upon payment in full for 292 acres on January 16, 1956, said Section 235 was patented to the Public Service Board of the City

of El Paso on January 26, 1956, by Patent No. 491, Volume 25-B, Abstract 10077 with all minerals reserved for the State;

That said sale was made under School File No. 152970 in the General Land Office the file wrapper of which bears the following indorsement: "Surface only sold";

In Testimony Whereof, I hereunto set my hand and affix the seal of said office the date first above written.

JACK (Illegible),
JERRY SADLER,
Commissioner Acting of The General Land Office.

(Seal)

JS/LG
Hardie, Grambling, Sims & Galatzan
Attorneys and Counselors at Law
3rd Floor, El Paso Natural Gas Co. Bldg.
El Paso, Texas

Attention: Mr. A. Galatzan.

Fee: $17.50.
Invoice No. 693 CF
Register No. 2161.
Dicta No. L-595 c.
File Nos. School Land 152973, 152972, 152951, 112018, 12119, 112101, 117016, 112121, SF 7230, 7219, 7218.
Mineral Land 4858.

Affidavit.

Filed Dec. 23 961.

(Title Omitted.)

Before Me, the undersigned authority, on this day personally appeared E. J. Umbenhauer, known by me to be a credible person, who, having been duly sworn, upon his oath deposes and says:

My name is E. J. Umbenhauer. I am the Director of the Public Service Board, an agency of the City of El Paso, and have been employed by the Public Service Board for the past 18 years. I am personally familiar with the location, use, occupancy and possession of the North Half (N/2) of Survey 240, S. F. 7219, Nellie D. Mundy, containing 328.65 acres, and Survey 235, S. F. 7230, Laura E. Mundy, containing 292 acres, both parcels of land being situated in El Paso County, Texas.

On October 20, 1955, the City of El Paso applied to the Commissioner of the General Land Office of the State of Texas to purchase the two parcels of land described hereinabove, and on November 14, 1955, such lands were sold to the City of El Paso. Patents for such lands were issued to the City of El Paso January 26, 1956 and filed for record in El Paso County, Texas, January 30, 1956. The patent covering the N/2 of Survey 240 is recorded in Book 1272, Page 554. The patent covering Survey 235 is recorded in Book 1272, Page 555. Both references are to the Deed Records of El Paso County, Texas.

Since January 26, 1956, the City of El Paso, through its Public Service Board, has continuously possessed and controlled the aforesaid lands, claiming same against the world, except for the mineral interests reserved by the State of Texas. During the period of time between January 26, 1956 to the present, the City of El Paso, through its Public Service Board, has surveyed such lands, placed signs thereon prohibiting dumping and hunting on or about such lands, and has removed unauthorized persons from the said premises, when found thereon.

The lands in question are raw, undeveloped lands and are not suitable for farming, grazing or other agricultural pursuits. No taxes of any nature have been assessed against such lands.

Further deponent sayeth not.

E. J. UMBENHAUER,
(E. J. Umbenhauer).

Subscribed And Sworn To on this 20th day of December, 1961, by the said E J. Umbenhauer.

DOROTHY A. BAILEY,
(Dorothy A. Bailey),
(Seal) Notary Public, El Paso County, Texas.

My commission expires June 1, 1963.

NOTICE OF MOTION FOR SUMMARY JUDGMENT.

(Title Omitted.)

To: Morris A. Galatzan,
El Paso National Gas Co. Bldg.,
El Paso, Texas,
Attorney for Defendant.

Please take notice that upon the annexed affidavits of..... and .... ..duly sworn to ....., 1961, and upon the Pleadings therein, the Exhibits annexed thereto and all of the proceedings heretofore had herein, the undersigned move this Court at Room..... of the United States Court House at El Paso, Texas, on the 22nd day of January 1962, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard for an order under Rule 56 of the Federal Rules of Civil Procedure for Summary Judgment in favor of the plaintiff upon all of the grounds set forth in the moving papers herein and for such other and different relief as the Court may deem just and proper in the premises.

Dated Dec. 21, 1961.

HAROLD S. LONG,
(Harold S. Long),

Caples Building,
El Paso, Texas.

GREENBERRY SIMMONS,
(Greenberry Simmons),
Attorneys for Plaintiff.

Kentucky Home Life Bldg.,
Louisville, Kentucky.

I certify that I have this 19th day of December, 1961, mailed a copy of this notice and a copy of the Plaintiff's motion for Summary Judgment, together with copy of Plaintiff's Exhibit, Nos. I-33H, attached thereto:

1. New certifications of Mr. Jerry Sadler, Commissioner of the General Land Office for the State of Texas, stating that he has actual custody of the originals of these dupli-certified copies.

2. Certificate of Judge Ben H. Rice, Jr., Austin, stating that Mr. Jerry Sadler, is the Commissioner of the General Land Office and is legal Custodian of the records of the General Land Office and that they are kept within his district.

3. Certifications of Mr. J. W. Fields, County Clerk of El Paso County, Texas and his deputy clerk, Antonio Chavez, stating that they have actual and legal custody of the originals of these duplicated certified copies.

To Mr. Morris A. Galatzan, El Paso National Gas Co. Bldg., El Paso, Texas, Attorney of record for Defendant.

Original Plaintiff's Exhibits Nos. 32A-32G, both inclusive, mailed to Clerk to be placed in U. S. District Court Clerk's safe.

GREENBERRY SIMMONS.

MOTION FOR SUMMARY JUDGMENT.

Filed Dec. 27, 1961.

United States District Court, Western District of Texas, El Paso Division.

Greenberry Simmons, Plaintiff,
vs. Civil Action No. 2334.
City of El Paso, Defendant.

Now comes Greenberry Simmons, Plaintiff in this action and respectfully shows to the Court that:

I.

After Plaintiff's complaint was filed and served on the Defendant, the Defendant filed and served on the Plaintiff his Answer. Plaintiff then filed and served on the Defendant certain Request for Admissions to the opposing party, as authorized by Rule 36 F.R.C.P. In due course, the Defendant filed and served on the Plaintiff his Response to the Request for Admissions, and his Answer to certain of them which had been served on it.

II.

The facts disclose by the Pleadings, which consist of the Complaint and the Answer and the Request for Admissions and the Responses thereto from the Defendant's attorneys of record show that there is no fact in dispute in this action which is material to disposition thereof, and plaintiff is entitled to judgment as a matter of law.

Plaintiff moves for a Summary Judgment on the Pleadings, Request for Admissions, the Defendant's Response thereto as provided in Rule 56 F.R.C.P.

Wherefore, Plaintiff prays that its motion be granted and that it have judgment against the defendant as prayed in its Complaint.

HAROLD S. LONG,
(Harold S. Long),

Caples Building,
El Paso, Texas.

GREENBERRY SIMMONS,
(Greenberry Simmons),
Attorneys for Plaintiff.

Kentucky Home Life Building,
Louisville, Kentucky.

Certificate of Judge of Court of Records that Attesting Officer Has Custody.

To comply with Federal Rules of Civil Procedure, Rule 44.

I, Ben H. Rice, Jr., Judge of the Western District of Texas, of the United States District Court, Austin, Travis County State of Texas do hereby certify that Jerry Sadler, whose name is subscribed to the foregoing certificates of attestation, now is and was, at the time of the signing and sealing of the same, the Commissioner of the General Land Office for the State of Texas and is legal custodian of the records of the General Land Office for the State of Texas, and that such records are kept in my District in Travis County, State of Texas.

Given under my hand and the seal of said Court, this 27th day of October, 1961.

(Signed) BEN H. RICE, JR.

(Seal)

Survey N/2 240 N.D. Mundy, El Paso County, Texas.

To Prove Chain of Title from State to Simmons; Certified Copies from County Clerk's Office of El Paso County, General Land Office of Texas or Secretary of State of Texas.

Plaintiff's Exhibit Nos.:

1. Application of W. H. Glenn to State for Purchase, "For Land AXS Additional To Home Tract", including Award, signature of Com. Jan. 29, 1910, awarded April 30, 1910 (Land Office).

2. Certificate of three years occupation issued under prior law May 10, 1913 #10189 (Land Office). 2 A.

3. Warranty Deed W. H. Glenn to Lee H. Orndorff, June 12, 1913, Vol. 231, p. 150, County Clerk's Office of El Paso County, Texas.

4. Warranty Deed Lee H. Orndorff and M. H Barrough grantors to D. G. Heineman, grantee, for whole section #240 Nellie D. Mundy, dated June 17, 1941 recorded Vol. 694, p. 373, County Clerk's Office, El Paso County, Texas.

5. Duplicate Receipt from General Land Office dated 7/19/41 paid by D. G. Heineman for $68.12 in-

terest on survey N/2 240 Nellie D. Mundy, 325.65 acres, El Paso County.

To avoid duplication see exhibit #24.

6. Letter of D. G. Heineman to Bascom Giles, General Land Office Commissioner dated Feb. 25, 1943, paid part interest on Survey 235 and promising to pay March 15, 1943. on N/2 Survey 240, N. D. Mundy.

7. Letter from Bascom Giles, Commissioner of General Land Office, dated May 1, 1947, stating that interest of $262.82 is due and to avoid forfeiture on July 1, 1947 it must be paid addressed to D. G. Heinman Estate.

8. Letter from Commissioner of General Land Office dated July 22, 1947 to D. G. Heinman Estate saying "This is to advise you that the above acreage was forfeited on the records as of July 21, 1947, for nonpayment of interest" marked "Returned unclaimed", never delivered.

9. Certificate by Land Commissioner that no grazing lease was on land involved during year of 1952.

To avoid duplication—Exhibits 10-15.

See Exhibits 28-33A.

To avoid duplication from 10 to 15 see Exhibits 28-33A.

10. Deed from Tella H. Heineman, individually and as heir to D. G. Heineman, deceased grantor to Greenberry Simmons dated June 10, 1952 recorded in the County Clerk office of El Paso County July 14, 1952, records of said County in Volume 1077, p. 540 covering survey N/2 240 Nellie D. Mundy containing 328.65 acres; survey 235, Laura E. Mundy, containing 292 acres.

11. Affidavit of heirship of Tella H. Heineman.

12. Deed D. H. Heineman to Greenberry Simmons.

13. Heirship affidavit of D. H. Heineman.

14. Certified copy of letter from Land Office July 24, 1952 to Greenberry Simmons.

14A. See Exhibits 32A-32H (32A same as 14A).

14B. See Exhibits 32A-32H (32B same as 14B).

14C. See Exhibits 32A-32H (32C same as 14C).

15. Certified copy of letter from acting Commissioner Wallace September 6, 1952 to Simmons.

Survey 235 Laura E. Mundy, El Paso County, Texas.

To Prove Chain of Title From State to Simmons; Certified Copies From County Clerk's Office of El Paso County, General Land Office of Texas or Secretary of State of Texas.

Plaintiff's Exhibit Nos.:

16. Application of John B. Kilpatrick to State for purchase, "For land as Additional To Home Tract", including Award, signature of Com. Jan. 29, 1910, awarded April 30, 1910 (Land Office).

17. Certificate of three years occupation issued under prior law May 21, 1913 as recorded in the County Clerk's Office of El Paso County, Vol. 235, p. 71. (Kilpatrick).

18. The will of John B. Kilpatrick bequeathing all of his property to his sister, Margaret Bobodilla, filed Feb. 12, 1929.

19. Order of probate of Kilpatrick's will March 29, 1929.

20. Royalty or mineral deed from Bobodilla to Heineman August 14, 1931.

21. Deed from Bobodilla to L. H. Brandt December 16, 1931, 1/4 undivided interest.

22. Deed from Bobodilla to D. G. Heineman dated July 21, 1941 for 1/2 undivided interest recorded in the County Clerk's Office of El Paso County, Volume 868, p. 575.

23. Duplicate receipts from the General Land Office dated September 2, 1941 and February 26, 1943 for interest paid by D. G. Heineman. (Nos. #23-A-23-B, Heineman; nos. 23C-24D, Bobodilla).

24. Letter of D. G. Heineman to the Commissioner of the General Land Office dated Feb. 25, 1943 paying $37.97 interest.

25. Letter from Bascom Giles, Commissioner of General Land Office dated May 1, 1947 stating that interest of $136.08 is due and to avoid forfeiture it must be paid addressed to D. G. Heineman Estate.

26. Letter from Commissioner of General Land Office dated July 22, 1947 to D. G. Heineman Estate saying "This is to advise you that the above acreage was forfeited on the records as of July 21, 1947, for nonpayment of interest marked "Returned unclaimed", never delivered.

27. Certified copy of outside of above envelope to this letter returned to the Land Office.

28. Deed from Tella H. Heineman, individually and as heir to D. G. Heineman, deceased grantor to Greenberry Simmons dated June 10, 1952 recorded in the County Clerk Office of El Paso County, July 14, 1952, records of said County in Volume 1077, p. 540 covering survey N/2 240 Nellie D. Mundy containing 328.65 acres; survey 235, Laura E. Mundy, containing 292 acres.

29. Affidavit of heirship of Tella H. Heineman.

30 Deed D H Heineman to Greenberry Simmons

31. Heirship affidavit of D. H. Heineman.

32. Certified copy of letter from Land Office July 24, 1952 to Greenberry Simmons.

32A. Copy of Exhibit 14 signed by Land Commissioner Giles sent to plaintiff dated July 24, 1952, returning 3 applications to reinstate forfeited land and 4 checks for all intesest due on forfeited lands.

32B. Application of plaintiff to reinstate forfeited Survey n/2 240, stamped by General Land office as follows "Received, July 23, 1952, General Land office" with General Land office number stamped on it 43325.

32C. Check payable to General Land office signed by Greenberry Simmons, for interest on n/2 240 dated 7-18-52, for $430.10, stamped with General Land office #43325 same number as is stamped on application to reinstate this land.

32D. Application of plaintiff to reinstate forfeited Survey 235, subscribed and sworn to before the deputy county clerk on July 17, 1952 stamped, "Received July 23, 1952, General Land Office" #43326.

32E. Check dated 7-18-52 payable to General Land Office for $252.02 for interest for reinstatement of Survey 235, signed by Greenberry Simmons and stamped in upper right hand corner with General Land Office number same as on the application #43326.

32F. Application of Greenberry Simmons to reinstate Sec. 24, Blk. 70, Tsp 1, T & PRR, grantee,

stamped on back "Received Jul 19, 1952 General Land Office" with 2 numbers stamped 42927 42928.

32G. Checks dated 7-16-52 payable to General Land Office for $1158.11 for reinstatement of Sec. 24, etc interest, stamped in upper right hand corner #42927 signed by Greenberry Simmons. #42927 same as stamped by Land Office on application to reinstate forfeited land.

32H. Check duplicated—it was damaged in the 3rd duplication process. The damaged check is available for inspection, dated 7-16-52 payable to General Land Office; the amount was left blank, it was for Bal due on reinstatement of Sec. 24, etc, for interest, signed by Greenberry Simmons. Stamped in upper Rt. Con., Land Office #42928.

33. Certified copy of letter from acting Commissioner Wallace September 6, 1952 to Simmons.

33A. Original Copy of the Certified Copy of Plaintiffs Exhibit #33, signed by acting Land Commissioner Wallace and received by plaintiff, saying "If you are satisfied with your title as recorded in the County Clerk's office of Hudspeth County, you should have no fear or worry"; dated September 6, 1952.

PLAINTIFF'S EXHIBIT
NO. I

Application For Land as Additional to Home Tract Applied For

To J. T. Robinson, Commissioner General Land Office:

I hereby apply to purchase under the provisions of Chapter 17, Act of 1895, and Chapter 129, Act of May 31, 1897, as the same was revised April 19, 1901, April 15, 1905, and May 16, 1907, the following land in El Paso County, Texas, about Yucca Miles (give course) Northwest from County Seat, and I agree to pay for said land the price per acre specified below:

Survey	Certificate	GRANTEE	Acres	Price per Acre	Classification
240	57 1214	Nellie E. Mundy	640	1 50	Mis. D. E.

I am over twenty-one years of age, and my postoffice address is El Paso

El Paso County, Texas. I have, since the 19th day of April, A. D. 1901, purchased ... Public School Land Acreage Units as follows:

Survey	Certificate	GRANTEE	Acres	P. O. Address when each Purchase was made
		None		

I ... am buying it for agricultural or grazing purposes ... express condition that the minerals therein shall ... I hereby make and subscribe to the following

W H Glass

... I desire to purchase said land as ... Survey 239, ... No 1218 Grantee Nellie ... that I will in good faith ... the land I purchase ... that I am now in possession ... with them for the purpose of ... or corporation is directly or in-

W H Glass Applicant

January 1910

Sec H Landoff

Notary Public El Paso County, Texas.

OBLIGATION

El Paso

El Paso County, Texas. I have, since the 19th day of April, A. D. 1901, purchased

from School Land Agent as follows:

Date of Purchase	Grantee	Acres	P. O. Address when each Purchase was made
	None		

I am holding it for agricultural or grazing purposes

and it is not my intention that the minerals thereon shall

be reserved. I hereby make and subscribe to the following

affidavit:

I desire to purchase said land as

Survey 239, Sec. 1218, Grantee McClure

I swear that I will in good faith

cultivate some portion of the land I purchase,

~~that I am now in possession~~ and that this is for the purpose of

actual cultivation and not speculation, directly or in-

directly.

Applicant

January 1910

Notary Public El Paso County, Texas

OBLIGATION

School Lands

No. 6 File No. 112119

APPLICATION OF

County

Land and Office

19

Additional to Home Applied For

Section Block Certificate Acres

Township County

In County

Filed 19

Commissioner General Land Office

Awarded 30 19

Rejected 19

J. Matteson

Commissioner General Land Office

By

County

Abstract

Vol.

Section

No.

Page

Land

Surveyor

General Land Office, Austin, Texas, October 18, 1961.

I, Jerry Sadler, Commissioner of the General Land Office of the State of Texas do hereby certify that on the reverse side hereof is a true and correct copy of the original of this instrument now on file in this office together with all indorsements thereon and further certify that I am the officer who has the custody of the filed original official records from which these true Certiied Copies were made.

In Testimony Whereof, I, hereunto set my hand and affix the seal of said office the day and date first above written.

JERRY SADLER,
(Jerry Sadler),
Commissioner of the General Land Office.

(Seal)

PLAINTIFF'S EXHIBIT

No. 2

1158-1102-8m.

STATE OF TEXAS,

El Paso County. } Before Me, the undersigned authority, this day personally appeared

A.F.Glenn

who having been duly sworn by me, states upon oath that he is the owner of the following school lands in

County, situated about thirteen miles from the county site

Block	Certificate	GRANTEE	Acres
	7218	Nellie D.Mundy	640
	7219	Nellie D.Mundy	640
	7220	Nellie D.Mundy	640
	7221	Nellie D.Mundy	640
	7222	Nellie D.Mundy	640
	7223	Nellie D.Mundy	640
	7225	Nellie D.Mundy	640
52	7014	T.&.P.Ry.Co.	640

The original number in the application to purchase being No 239 , Blk

assigned to A.F.Glenn (original grantee Nellie D.Mundy)

The said lands were settled upon and occupied as follows

State the facts with particularity—not overlooking when and on which section settlement was made and on which section residence was permanently fixed, and if the land has been sold, state where and time each purchaser resided

A.F.Glenn states upon his oath, that he on or about the 15th day of July, 1901, he actually went upon said section 239 of the above described land in person and took up his actual bonafide residence upon said section 239 of the above described lands and has resided upon the same continuously since the said on or about the 15th day of July, 1901, he is now an actual bonafide resident upon said Section. That his actual bonafide home upon said section since on or about the 15th day of July, A.D.1901.

The designated home section in the application to purchase being No. 299, Blk. ____ Cert. 7218, issued to W.H.Glenn (Original grantee Willis D.Money.)

That said lands were settled upon and occupied as follows:

(State the facts with particularity—not overlooking when and on which section settlement was made and on what section residence was permanently fixed, and if the land has been sold, state where and when such publication was made.)

The said W.H.Glenn states upon his oath, that he on or about the 15th day of July A.D.1910, he actually went upon Section 299 of the above described lands in person and took up his actual bonafide residence upon said Section 299 of the above described lands and has resided upon said Section 299 continuously since the date of his first entry upon said Section of July A.D.1910 and is now an actual bonafide resident upon said Section and has had his actual bonafide home upon said Section since on or about the said 15th day of July A.D.1910.

That the improvements described below are worth the amounts specified and were caused to be placed on the sections indicated by the persons named at the time stated, as follows:

The said W.H.Glenn has erected on his home Section one four (4) room adobe dwelling house, with two porches, shingle roof, bath and all modern improvements, which cost more than $2000.00.
Also one well, with Gasoline Engine and Pump, which cost more than $500.00.
Also One Barn, Corral, Chicken houses, etc., which cost more than $200.00.
Also woven wire fence around house, barn, etc., which cost more than $90.00, Also has planted orchard which cost more than $100.00, all of which said improvements are worth at least $2850.00 cash.

Said affiant W.H.Glenn further states upon his oath that he commenced to improve said home Section 299 as soon as he took up his residence thereon and that said improvements have been made from time to time on said Section up to the present date, all as hereinabove stated.

Also at the same time personally appeared Sam B. Gillett, J. T. Porcher and

three credible citizens of El Paso County, each of whom having been duly sworn

upon oath says: That the facts above stated in regard to occupancy and permanent improvements are within the

edge of each, true and correct, and that each for himself says upon oath that he is not either directly or indirectly

terested in the land or title thereto.

J H Gillett

Sam B. Gillett

R C Buby

Julius T Porcher

Subscribed and sworn to before me this 3rd day of May 19

NOTE—Officer must not omit seal.

Notary Public, El Paso

(3)

File No. 112108

County.

SCHOOL LAND

PROOF OF OCCUPANCY AND IMPROVEMENTS

Filed 5 1 19 13

J H Gillett Commissioner.

W O Brice File Clerk

10189

Certificate of Occupancy issued and sent to

Brice Lowe

El Paso Tex

11 day of May 19 13

J H Gillett Commissioner.

FILED

General Land Office, Austin, Texas, October 18, 1961.

I, Jerry Sadler, Commissioner of the General Land Office of the State of Texas do hereby certify that on the reverse side hereof is a true and correct copy of the original of this instrument now on file in this office together with all indorsements thereon and further certify that I am the officer who has the custody of the filed original official records from which these true Certified Copies were made.

In Testimony Whereof, I, hereunto set my hand and affix the seal of said office the day and date first above written.

JERRY SADLER,
(Jerry Sadler),
Commissioner of the General Land Office.

(Seal)

PLAINTIFF'S EXHIBIT No. 2A.

53487.

Cert. of Three Years Residence.

General Land Office No. 10189.

I, J. H. Walker, Chief Clerk, acting Commissioner of the General Land Office of the State of Texas, do hereby certify that W. H. Glenn on the 5th day of Mav A. D. 1913, filed proof of three consecutive years' residence and occupancy on Section No. 239 Block No. ... S. F. No. 7218, Tsp. ..., Grantee Nellie D. Mundy in El Paso County, as required by Articles 4218j and 4218l, Revised Civil Statutes of 1895, and said

proof is corroborated by the affidavits of Sam B. Gillett, R. C. Bailey and Julius T. Porcher, whose credibility is certified to by C. H. Jones, as Notary Public El Paso County, Texas; that said land was originally sold to W. H. Glenn on 29th day of Jany. A. D. 1910.

The following lands were purchased as additional to Section 239, Block ..., S. F. No. 7218, Tsp..... Grantee Nellie D. Mundy, in El Paso County, and are hereby included in this certificate by request.

Part of	Section	Block	Certificate	Grantee	County
	10	82	7014	T.&P. Ry. Co.	El Paso
			S. F.		
	240		7219	Nellie D. Mundy	"
	241		7220	" "	"
	242		7221	" "	"
	243		7222	" "	"
	244		7223	" "	"
	246		7225	" "	"

In Testimony Whereof, I hereunto set my hand and cause to be affixed the Seal of the General Land Office. Done at Austin, Texas, this the 10 day of May A. D. 1913.

File 112108 to 14. 117996. Fee Paid $4.50.

J. H. WALKER,
Acting Commissioner of the
General Land Office.

Filed for record May 17, 1913 at 3:45 P.M.

And recorded May 31, 1913 at 9:15 A.M.
PARK W. PITMAN,
County Clerk,
By L. C. BOWLES,
Deputy.

The State of Texas,
County of El Paso.

I, J. W. Fields, County Clerk in and for El Paso County, State of Texas, do hereby certify that the foregoing is a true and correct copy of the: Certificate, From State of Texas to W. H. Gleen Dated the 10 day of May 1913, as the same appears of record in the Deed Records of Said County in Volume 221 page 585 thereof.

Given under my hand and seal of office, at office in El Paso, Texas, this the 2 day of Nov. A. D. 1961.

J. W. FIELDS,
County Clerk,
By ANTONIO CHAVEZ,
Deputy.

(Seal)

County Clerk's Office of El Paso County, Texas, dated this 2 day f Nov. 1961.

I, J. W. Fields, County Clerk of El Paso County, Texas and Antonio Chavez, his deputy, further Certify that we are the officers who have the custody of the filed original official records from which these true Certified Copies were made and also we have the legal custody of these filed original official records.

In Testimony Whereof, we hereto set our hands and affix the seal of said office the day and date first above written.

J. W. FIELDS,
(J. W. Fields),
County Clerk of El Paso County, Texas,
ANTONIO CHAVEZ,
(Antonio Chavez),
Deputy.

(Seal)

PLAINTIFF'S EXHIBIT No. 3.

54160.

Warranty Deed.

The State of Texas,
County of El Paso.

Know All Men By These Presents: That we, W. H. Glenn and wife Iva B. Glenn, of the County of El Paso, State of Texas for and in consideration of the sum of Ten ($10.00)—and other good and valuable considerations Dollars, to us in hand paid by Lee H. Orndorff, the receipt of which is hereby acknowledged, and the assumption by the said Lee H. Orndorff of one half of the indebtedness now due the State of Texas on the hereinafter described lands.

Have Granted, Sold and Conveyed, and by these presents do Grant, Sell and Convey, unto the said Lee H. Orndorff, of the City of El Paso, of the County of El Paso, State of Texas, all that certain tract or parcel of land situated in El Paso County, Texas, and being the undivided one half interest in and to

all of Section two hundred and forty two (242), Certificate No. 7221 of the Public School Lands of El Paso County, Texas, also the undivided one half interest in Sections two hundred and forty three (243), Certificate No. 7222, two hundred and forty four (244), Certificate No. 7223 and Section two hundred and forty six (246), Certificate No. 7225 and the undivided half interest in the South half of section 240, certificate 7219 and Section ten (10), Block Numbered Eighty two (82) Certificate No. 7014 T. & P. Ry. Co's surveys, all in El Paso County, Texas, it being intended to convey and there is hereby conveyed the undivided one half interest in and to all of the above described lands.

Also all of the North half of Section two hundred and forty (240), Certificate No. 7219 of the Public School Lands in El Paso County, Texas, so that from this date said North half of said Section 240 shall be owned individually by said Lee H. Orndorff and the South half of said Section 240 Oshall be owned jointly by the said W. H. Glenn and Lee H. Orndorff.

It is intended to convey by this deed and there is conveyed by this deed to the said Lee H. Orndorff all of the North half said Section 240, Certificate No. 7219, which said Lee H. Orndorff shall own individually from this date; and said Lee H. Orndorff shall own the undivided one half of the South half of said Section 240, Certificate No. 7219, the other undivided one half in said South half of said Section being retained by the grantors herein, also said Lee H. Orndorff shall own the undivided one half interest in and all of said sections 242, 243, 244, 246 and said section 10 in Block No. 82 T. & P. Ry. Co's surveys, said W. H. Glenn retaining the other undivided one half interest in and to said surveys.

To Have and To Hold the above described premises, together with all and singular the rights and appurtenances thereto in anywise belonging unto the said Lee H. Orndorff, his heirs and assigns forever; and we do hereby bind ourselves, our heirs, executors and administrators, to warrant and Forever Defend, all and singular the said premises unto the said Lee H Orndorff, his heirs and assigns, against every person whomsoever lawfully claiming, or to claim the same or any part thereof.

Witness our hands at El Paso, Texas, this 12th day of June A. D. 1913.

Witnesses at Request of Grantor:
W. H. GLENN,
IVA B. GLENN.

The State of Texas,
County of El Paso.

Before Me, the undersigned authority a Notary Public, in and for El Paso County, Texas, on this day personally appeared W. H. Glenn and Iva B. Glenn his wife, both known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they each executed the same for the purposes and consideration therein expressed, and the said Iva B. Glenn wife of the said W. H. Glenn having been examined by me privily and apart from her husband, and having the same fully explained to her, she, the said Iva B. Glenn acknowledged such instrument to be her act and deed, and she declared that she had willingly signed the same for the purposes and consideration therein expressed, and that she did not wish to retract it.

all of Section two hundred and forty two (242), Certificate No. 7221 of the Public School Lands of El Paso County, Texas, also the undivided one half interest in Sections two hundred and forty three (243), Certificate No. 7222, two hundred and forty four (244), Certificate No. 7223 and Section two hundred and forty six (246), Certificate No. 7225 and the undivided half interest in the South half of section 240, certificate 7219 and Section ten (10), Block Numbered Eighty two (82) Certificate No. 7014 T. & P. Ry. Co's surveys, all in El Paso County, Texas, it being intended to convey and there is hereby conveyed the undivided one half interest in and to all of the above described lands.

Also all of the North half of Section two hundred and forty (240), Certificate No. 7219 of the Pubiic School Lands in El Paso County, Texas, so that from this date said North half of said Section 240 shall be owned individually by said Lee H. Orndorff and the South half of said Section 240 Oshall be owned jointly by the said W. H. Glenn and Lee H. Orndorff.

It is intended to convey by this deed and there is conveyed by this deed to the said Lee H. Orndorff all of the North half said Section 240, Certificate No. 7219, which said Lee H. Orndorff shall own individually from this date; and said Lee H. Orndorff shall own the undivided one half of the South half of said Section 240, Certificate No. 7219, the other undivided one half in said South half of said Section being retained by the grantors herein, also said Lee H. Orndorff shall own the undivided one half interest in and all of said sections 242, 243, 244, 246 and said section 10 in Block No. 82 T. & P. Ry. Co's surveys, said W. H. Glenn retaining the other undivided one half interest in and to said surveys.

To Have and To Hold the above described premises, together with all and singular the rights and appurtenances thereto in anywise belonging unto the said Lee H. Orndorff, his heirs and assigns forever; and we do hereby bind ourselves, our heirs, executors and administrators, to warrant and Forever Defend, all and singular the said premises unto the said Lee H Orndorff, his heirs and assigns, against every person whomsoever lawfully claiming, or to claim, the same or any part thereof.

Witness our hands at El Paso, Texas, this 12th day of June A. D. 1913.

Witnesses at Request of Grantor:
W. H. GLENN,
IVA B. GLENN.

The State of Texas,
County of El Paso.

Before Me, the undersigned authority a Notary Public, in and for El Paso County, Texas, on this day personally appeared W. H. Glenn and Iva B. Glenn his wife, both known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they each executed the same for the purposes and consideration therein expressed, and the said Iva B. Glenn wife of the said W. H. Glenn having been examined by me privily and apart from her husband, and having the same fully explained to her, she, the said Iva B. Glenn acknowledged such instrument to be her act and deed, and she declared that she had willingly signed the same for the purposes and consideration therein expressed, and that she did not wish to retract it.

Given Under My Hand And Seal Of Office, This 13 day of June A. D. 1913.

THOS. M. MAYFIELD,
Notary Public, El Paso County, Texas.

(Notarial Seal)

Filed for record June 13, 1913 at 4:45 P.M.

And recorded June 25, 1913 at 4:30 P.M.

PARK W. PITMAN,
County Clerk,
By L. C. BOWLES,
Deputy.

The State of Texas,
County of El Paso.

I, J. W. Fields, County Clerk in and for El Paso County, State of Texas, do hereby certify that the foregoing is a true and correct copy of the: Warranty Deed From W. H. Gleen et ux to Lee H. Orndoroff Dated the 12 day of June 1913, as the same appears of record in the Deed Records of Said County in Volume 231 page 150 thereof.

Given under my hand and seal of office, at office in El Paso, Texas, this the 2 day of Nov. A. D. 1961.

J. W. FIELDS,
County Clerk,
By ANTONIO CHAVEZ,
Deputy.

(Seal)

County Clerk's Office of El Paso County, Texas, dated this 2 day of Nov. 1961.

I, J. W. Fields, County Clerk of El Paso County, Texas and Antonio Chavez, his deputy, further Certify that we are the officers who have the custody of the filed original official records from which these true Certified Copies were made and also we have the legal custody of these filed original official records.

In Testimony Whereof, we hereto set our hands and affix the seal of said office the day and date first above written.

J. W. FIELDS,
(J. W. Fields),
County Clerk of El Paso County, Texas,
ANTONIO CHAVEZ,
(Antonio Chavez),
Deputy.

(Seal)

PLAINTIFF'S EXHIBIT No. 4.

Warranty Deed.
21690.

The State of Texas,
County of El Paso.
Know All Men By These Presents:

That we, Lee H. Orndorff and M. H. Barrough, not joined by our wives because the property herein conveyed forms no part of our homesteads, of the County of El Paso, State of Texas, for and in consideration of the sum of $10.00 cash to us in hand paid by D. G. Heineman, receipt of which is acknowledged,

have Granted, Sold and Conveyed, and by these presents do Grant, Sell and Convey, unto the said D. G. Heineman, of the County of El Paso, State of Texas, all that certain real estate, located in El Paso County, Texas, described as follows, towit:

Section No. 240, S. F. 7219, Nelie D. Mundy grantee, containing 657.3 acres, more or less; section No. 242, S. F. 7221, Nellie D. Mundy grantee, containing 640 acres, more or less; and section No. 243, S. F. 7222, Nellie D. Mundy grantee, containing 637.6 acres, more or less;

Grantee takes said land subject to the State debt and interest thereon, against said land, and grantors do not warrant against the same.

This deed is intended and shall be construed as a separate conveyance of each respective section, and the grantee assumes the taxes on each respective section accordingly, but the taxes so assumed on any one section shall not affect nor be affected by any other section, and no release of any implied lien shall be required of the grantors.

To Have and To Hold the above described premises, together with all and singular the rights and appurtenances thereto in anywise belonging unto the said D. G. Heineman, his heirs and assigns forever and we do hereby bind ourselves, our heirs, executors and administrators, to Warrant and Forever Defend, all and singular the said premises unto the said D. G. Heineman, his heirs and assigns, against every person whomsoever lawfully claiming, or to claim the same, or any part thereof, by thru or under us, but not otherwise.

Witness our hands at El Paso, Texas, this 17th day of June, 1941.

Witness at request of Grantor:
(Stamps)

LEE H. ORNDORFF,
M. H. BARROUGH.

Single Acknowledgment.

The State of Texas,
County of El Paso.

Before Me, the undersigned, a Notary Public in and for said County and State, on this day personally appeared Lee H. Orndorff and M. H. Barrough, known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given Under My Hand and Seal of Office this the 17th day of June, A. D. 1941.

EVELYN K. WEHLING,
(Evelyn K. Wehling),
(Seal) Notary Public, El Paso County, Texas.

21690 Warranty Deed From Lee H. Orndorff, M. H. Barrough to D. G. Heineman. Filed for Record Jul. 16, 1941 at 4:00 o'clock P.M. and Recorded July 21, 1941 at 9 o'clock A.M., By P. D. Lowry, County Clerk. By W. H. Dundan, Deputy. This instrument should be filed immediately with the County Clerk for record. 6/17/41.

The State of Texas,
County of El Paso.

I, J. W. Fields, County Clerk in and for El Paso County, State of Texas, do hereby certify that the foregoing is a true and correct copy of the: Warranty Deed From Lee H. Orndorff et al., to D. G. Heineman Dated the 17 day of June 1941, as the same appears of record in the Deed Records of Said County in Volume 694 page 373 thereof.

Given under my hand and seal of office, at office in El Paso, Texas, this the 21 day of July, A. D. 1961.

J. W. FIELDS,
County Clerk,
By ANTONIO CHAVEZ,
(Seal) Deputy.

County Clerk's Office of El Paso County, Texas, dated this 13 day of Oct., 1961.

I, J. W. Fields, County Clerk of El Paso County, Texas and Antonio Chavez, his deputy, further Certify that we are the officers who have the custody of the filed original official records from which these true Certified Copies were made and also we have the legal custody of these filed original official records.

In Testimony Whereof, we hereto set our hands and affix the seal of said office the day and date first above written.

J. W. FIELDS,
(J. W. Fields),
County Clerk of El Paso County, Texas,
ANTONIO CHAVEZ,
(Antonio Chavez),
(Seal) Deputy.

PLAINTIFF'S EXHIBIT No. 5.

Duplicate Receipt.
(To be Kept by Land Office)

Ledger 171.
Page 473.
File No. 147016.

23054.

Posted Post Office El Paso, Tex. 7/17, 1941.

To the Commissioner General Land Office, Austin, Texas. Suite 322 El Paso Nat'l. Bank Bldg.

I enclose (Say whether Money Order or Draft on a Bank in Austin, or Cash.) Ch for $68.12, payable to the "State Treasurer," of which ($..... are for principal $68.12 are for interest) payment on the following land purchased from the State by ....., to-wit:

N½ Section 240.
Block.....
Township .....
Certificate S.F. 7219.
Grantee Nellie D. Mundy.
Acres 328.65.
County El Paso 7/19/41.

It is (Say whether School, Asylum, or University.) School Land.

(Name of Sender.) E. W. Earl, D. G. Heineman.

.....,

Commissioner General Land Office.

General Land Office, Austin, Texas, October 18, 1961.

I, Jerry Sadler, Commissioner of the General Land Office of the State of Texas do hereby certify that on the reverse side hereof is a true and correct copy of the original of this instrument now on file in this office together with all indorsements thereon and further certify that I am the officer who has the custody of the filed original official records from which these true Certified Copies were made.

In Testimony Whereof, I, hereunto set my hand and affix the seal of said office the day and date first above written.

JERRY SADLER,
(Jerry Sadler),
Commissioner of the General Land Office.

(Seal)

PLAINTIFF'S EXHIBIT No. 6.

To avoid duplication see Exhibit #24.

PLAINTIFF'S EXHIBIT No. 7.

May 1, 1947

D. G. Heineman Estate
El Paso National Bank Bldg.
El Paso, Texas

Re: N/2 Section 240, Nellie D. Munday, 328.65 acres in El Paso County.

Gentlemen:

The records of this office reflect that you have made payments on the above described lands, on which there is a sum of $262.82 due as interest and penal interest to November 1, 1946.

If you are the present owner and are desirous of protecting your rights in this acreage, it will be necessary that remittance of the above amount, together with penal interest at the rate of 5% per annum, calculated from November 1, 1946 to date of payment, be made to avoid forfeiture of the account on July 1, 1947. Unless I have received payment prior to that date, it will be presumed that you are not further interested in this land, and this will serve as my notice of forfeiture on the above stated date.

Sincerely yours,
BASCOM GILES,
Commissioner of the General Land Office.

CRL:pd
File: 147016

General Land Office, Austin, Texas, October 18, 1961.

I, Jerry Sadler, Commissioner of the General Land Office of the State of Texas, do hereby certify that on the reverse side hereof is a true and correct copy of the original of this instrument now on file in this office, together with all indorsements thereon and further certify that I am the officer who has the custody of the filed original official records from which these true Certified Copies were made.

In Testimony Whereof, I hereunto set my hand and affix the seal of said office the day and date first above written.

JERRY SADLER,
(Jerry Sadler),
Commissioner of the General Land Office.

(Seal)

PLAINTIFF'S EXHIBIT No. 8.

General Land Office
State of Texas
Austin

Bascom Giles, Commissioner
Alvis Vandygriff, Chief Clerk

July 22, 1947

D. G. Heineman Estate
El Paso National Bank Bldg.
El Paso, Texas

Re: N/2 Section 240, Nellie D. Munday, 328.65 acres, El Paso, County.

Gentlemen:

This is to advise you that the above acreage was forfeited on the records of this office as of July 21, 1947, for non-payment of interest.

In order that you may have complete information regarding recent legislation governing reinstatement of forfeited accounts, I enclose herewith a summary of House Bill No. 56 of the 47th Legislature.

In making inquiry regarding this land, it will be necessary that you give the full description as shown above.

Sincerely yours,
BASCOM GILES,
(Bascom Giles),
Commissioner of the General Land Office

CRL:pd
File: 147016
Encl.

Returned unclaimed.

General Land Office, Austin, Texas, October 18, 1961.

I, Jerry Sadler, Commissioner of the General Land Office of the State of Texas do hereby certify that on the reverse side hereof is a true and correct copy of the original of this instrument now on file in this office together with all indorsements thereon and further certify that I am the officer who has the custody of the filed original official records from which these true Certified Copies were made.

In Testimony Whereof, I, hereunto set my hand and affix the seal of said office the day and date first above written.

JERRY SADLER,
(Jerry Sadler),
Commissioner of the General Land Office.

(Seal)

PLAINTIFF'S EXHIBIT No. 9.

The State of Texas
General Land Office
Austin 14, Texas

Jerry Sadler
Commissioner

October 18, 1961

I, Jerry Sadler, Commissioner of the General Land Office of the State of Texas, do hereby certify that after diligent seasch no record is found to exist in the records of this office as to the existence during

the year 1952 of any form or type of lease from the State of Texas on the following lands:

(1) Survey 235, SF 7230, Laura E. Mundy Survey, Abstract No. 10077 as consisting of 292 acres in El Paso County, Texas;

(2) North half of Survey 240, SF 7219, Nellie D. Mundy Survey, Abstract No. 10078, as consisting of 328.65 acres in El Paso County, Texas;

In Testimony Whereof, I hereunto set my hand and affix the seal of said office the date first above written.

JERRY SADLER,
(Jerry Sadler),
Commissioner of the General Land Office.

(Seal)

JS/lg

Mr. Greenberry Simmons
Attorney At Law
Kentucky Home Life Building
Louisville 2, Kentucky

Fee: $8.50.
Invoice No. 789 CF.
Account No. 742.
El Paso School Files: 152972, 152973, 112121, 147016.
Dicta No. L-655 c.

General Land Office, Austin, Texas, October 18, 1961.

I, Jerry Sadler, Commissioner of the General Land Office of the State of Texas do hereby certify that

I am the officer who has custody of the filed original official records and documents of the General Land Office and that the attached and foregoing Certificate of Facts has been faithfully prepared from said records and documents to reflect the archival history of the lands recited therein.

In Testimony Whereof, I, hereunto set my hand and affix the seal of said office the day and date first above written.

JERRY SADLER,
(Jerry Sadler),
Commissioner of the General Land Office.

PLAINTIFF'S EXHIBITS Nos. 10-15.

To Avoid Duplication See Exhibits # 28-33A.

PLAINTIFF'S EXHIBIT NO. 16

Application For Land as Additional to Home Tract Applied For

To J. T. Robinson, Commissioner General Land Office:

I hereby apply to purchase under the provisions of Chapter 47, Act of 1895, and Chapter 129, Act of May 14, 1897, and the Acts approved April 19, 1901, April 15, 1905, and May 16, 1907, the following land situated in El Paso County, Texas, about Fifteen Miles (give course) West from County Seat, and I agree to pay for said land the price per acre specified below:

Survey	Block	Certificate	GRANTEE	Acres	Price per Acre	Classification
Lindsey 237	—	7237	Laura E. Lindsey	640	$1.50	Non-M

I am over twenty-one years of age, and my postoffice address is El Paso

El Paso County, Texas. I have, since the 19th day of April, A. D. 1901, purchased no Public Free School and Asylum lands as follows:

Survey	Block	Certificate	GRANTEE	Acres	P. O. Address when each Purchase was made
None					

For the purpose of my oath and I represent that I am buying it for agricultural or grazing purposes and that the sale to me is upon the express condition that the minerals thereon shall be reserved to the State, which the land belongs, and I hereby make and subscribe to the following

I John R. Kilpatrick do solemnly swear that I desire to purchase said land as additional to the home tract which I have applied to purchase, as follows: Section No. Survey 238 Block — Township — Certificate 1.F. 7233 Grantee Laura E. Lindsey in El Paso County, and that I will in good faith commence to improve and reside upon my home tract or upon some portion of the land I purchase, within three months from the date my application for my home tract is accepted, or that I am not now, and will not be personally, directly or indirectly, and that I am not acting in collusion with others for the purpose of purchasing this land for any other person or corporation, and that no other person or corporation is directly or indirectly interested in the purchase thereof.

Signed John R. Kilpatrick Applicant

Subscribed and sworn to before me this 23rd day of November A.D. 1907

County, Texas

Officer must not put on seal

Public Free School and Asylum lands as follows?

Block	Certificate	GRANTEE	Acres	P O Address when each Purchase was made
		None		

I, the undersigned, do solemnly swear that I desire to purchase said land as agricultural or grazing purposes, and that I am buying it for agricultural or grazing purposes, and not for the purpose of speculation, and that the sale to me is upon the express condition that the minerals thereon shall belong to the State of Texas, which the said land belongs, and I hereby make and subscribe to the following

I, John R. Kilpatrick, do solemnly swear that I desire to purchase said land as agricultural or grazing land, which I have applied to purchase, as follows: Section No. Survey 238 GH, Township —, Certificate 1F 7233, Grantee Laura E. [illegible] County, and that I will in good faith commence the actual bona fide settlement on my home tract or on some portion of the land I purchase, to date my application for my home tract is accepted, or that I am a permanent resident, and that I am not acting in collusion with others for the purpose of speculation, or with any other person or corporation, and that no other person or corporation is directly or indirectly interested in the purchase thereof.

Sworn to before me this [illegible] day of [illegible], 19[illegible]

John R. Kilpatrick, Applicant

[illegible] Notary Public

[illegible] County, Texas

Other notarization if any

OBLIGATION

[illegible] School Lands.

I, the undersigned, do promise to pay to the State of Texas the sum of One Hundred Thirty and 20/100 Dollars with interest thereon as hereinafter specified, the same being the purchase money for the following described tract of land purchased by me this day in accordance with the provisions of Chapter 17, Act of 1895, and Chapter 129, Acts of May 1st, 1901, and May 16, 1907, to wit: Survey of Section No. 235, Township —, Certificate 1F 7230, Grantee Laura E. [illegible], [illegible] County, Texas.

I promise to pay interest at the rate of three per cent upon all unpaid principal, together with one fortieth of the original purchase money to be paid to the State Treasurer at Austin, Travis County, Texas, on or before the [illegible] day of [illegible] after the whole purchase money is paid. And it is expressly understood and agreed by me that in addition to the conditions, limitations and requirements, as I am subject to and accept all the conditions contained in the above recited Acts.

Witness my hand, this [illegible] day of January, 19[illegible].

Witness, Texas

John R. Kilpatrick

No. File 112121

File No. 112121

APPLICATION OF

P. O.

County

Land District

Additional to Home Applied For

Filed 19

Section	Block	Certificate	Acres

Township Grantee

Commissioner

File Clerk

In County

Filed 19

Commissioner General Land Office.

APP 361

Awarded 19

Rejected 19

Commissioner General Land Office.

Roll

Class

Appr'm't

Appl'n

Obligation

Seal

Map

Lease

On Market

Printed and For Sale by

APR 26

General Land Office, Austin, Texas, October 18, 1961.

I, Jerry Sadler, Commissioner of the General Land Office of the State of Texas do hereby certify that on the reverse side hereof is a true and correct copy of the original of this instrument now on file in this office together with all indorsements thereon and further certify that I am the officer who has the custody of the filed original official records from which these true Certified Copies were made.

In Testimony Whereof, I, hereunto set my hand and affix the seal of said office the day and date first above written.

JERRY SADLER,
(Jerry Sadler),
Commissioner of the General Land Office.

(Seal)

PLAINTIFF'S EXHIBIT No. 17.

53774.

Certificate of Three Years Residence.

General Land Office No. 10213.

I, J. T. Robison, Commissioner of the General Land Office of the State of Texas, do hereby certify that John B. Kilpatrick on the 19th day of May A. D. 1913, filed proof of three consecutive years' residence and occupancy on—Section No. 238 Block No. ....., S.F. No. 7233 Tsp. ....., Grantee Laura E. Mundy in El Paso County, as required by Articles 4218j and 4218l, Revised Civil Statutes of 1895; and said proof is corroborated by the affidavits of R. C. Barby, J. W. Spivey and Julius T. Borcher whose credibility is cer-

tified to by Sam B. Gillett as Notary Public, El Paso County, Texas; that said land was originally sold to John B. Kilpatrick on 29th day of Jany. A. D 1910 The following lands were purchased as additional to Section 238, Block ..... S.F. No. 7233, Tsp..... Grantee Laura E Mundy in El Paso County and are hereby included in this certificate by request.

Part of	Section	Block	Certificate	Grantee	County
	6	82	7012	T. & P. Ry. Co.	El Paso
	235		7230	Laura E. Mundy	" "
	236		7231	" " "	" "
	237		7232	" " "	" "
	245		7224	Nellie D. Mundy	" "
	253		7246	Clara A. Mundy	" "
	254		7247	" " "	" "

In testimony whereof, I, hereunto set my hand and cause to be affixed the seal of the General Land Office. Done at Austin, Texas, this the 21st day of May, A. D. 1913.

File 112119 to 25 118007.

Fee paid $4.50.

J. T. ROBISON,
Commissioner of the General Land Office.

(Seal General Land Office The State of Texas.)

Filed for Record May 29, 1913 at 11:19 A.M.

PARK W. PITMAN,
County Clerk.

And Recorded June 12, 1913 at 10:40 A.M.
By L. C. BOWLES,
Deputy.

(Seal)

The State of Texas,
County of El Paso.

I, J. W. Fields, County Clerk in and for El Paso County, State of Texas, do hereby certify that the foregoing is a true and correct copy of the: Certificate John B. Kilpatrick Dated the 21 day of May 1913, as the same appears of record in the Deed Records of Said County in Volume 235 page 71 thereof.

Given under my hand and seal of office, at office in El Paso, Texas, this the 18 day of Aug. A. D. 1961.

J. W. FIELDS,
County Clerk,
By ANTONIO CHAVEZ,
Deputy.

(Seal)

County Clerk's Office of El Paso County, Texas, dated this 13 day of Oct., 1961.

I, J. W. Fields, County Clerk of El Paso County, Texas and Antonio Chavez, his deputy, further Certify that we are the officers who have the custody of the filed original official records from which these true Certified Copies were made and also we have the legal custody of these filed original official records.

In Testimony Whereof, we hereto set our hands and affix the seal of said office the day and date first above written.

J. W. FIELDS,
(J. W. Fields),
County Clerk of El Paso County, Texas,
ANTONIO CHAVEZ,
(Antonio Chavez),
Deputy.

(Seal)

PLAINTIFF'S EXHIBIT No. 18.

5497

Will of John Boyd Kilpatrick.

Filed Feb. 12, 1929, W. D. Greet, County Clerk, by (Illegible) Deputy.

In the Name of God Amen! I John Boyd Kilpatrick, of El Paso, El Paso County in the State of Texas, being of sound mind and memory, knowing the uncertainty of human life, do now make and publish this my last will and testament:

Imprimis: It is my will, and I do hereby authorize and direct the person hereinafter named as executor to pay all my just debts including the expenses of my last illness, and of my funeral, as soon as practical after my decease, and in order to enable said Executor to do so, I desire that my said Executor shall have full power to sell such of my property as the Executor may deem necessary for such purpose.

Secondly, I do hereby will, devise and bequeath all property, and estate, real and personal, and mixed, belonging to me at my decease, as follows to the following Devisees and Legatees, each and all of

them, in severalty, and to their heirs forever, that is to say:

I do will, devise and bequeath to my beloved sister, Mrs. Margaret Bobadilla all of my estate, both real and personal of every kind whatsoever, and wherever situated, and to have and to hold as her absolute property, to her heirs and assigns forever.

I do hereby nominate and appoint L. H. Brandt, of Vinton, Texas, as the Executor of this my last will and testament, and do hereby direct that no security shall be required of said Executor for the performance of such duties, and that letters testamentary be issued to said Executor without bond.

It is my will, and I do hereby provide and direct that no other action shall be had in the County Court having jurisdiction in relation to the settlement of my estate than the publishing and recording of this will and the return of an inventory, appraisement and list of claims of my estate.

And I do revoke any and all former wills by me made, and publish and declare this to be my last will and testament at the City of E Paso, County of El Paso, in the State of Texas, this 19th day of April, A: D. 1917.

In testimony whereof, I do hereby set my name and scroll in lieu of and for seal the date last above written, in the presence of the following named persons, who sign the same as witnesses at my request and in the presence of each other.

JOHN BOYD KILPATRICK.
(Seal.)

Witnesses:
R. E. BRYANT,
G. J. TROUT.

A True and Correct Copy, I Hereby Certify, July 21, 1961.

J. W. FIELDS,
Clerk, County Court, El Paso County, Texas,
By ANTONIO CHAVEZ,
Deputy.

(Seal)

County Clerk's Office of El Paso County, Texas, dated this 13 day of Oct., 1961.

I, J. W. Fields, County Clerk of El Paso County, Texas and Antonio Chavez, his deputy, further Certify that we are the officers who have the custody of the filed original official records from which these true Certified Copies were made and also we have the legal custody of these filed original official records.

In Testimony Whereof, we hereto set our hands and affix the seal of said office the day and date first above written.

J. W. FIELDS,
(J. W. Fields),
County Clerk of El Paso County, Texas,
ANTONIO CHAVEZ,
(Antonio Chavez),
Deputy.

(Seal)

PLAINTIFF'S EXHIBIT No. 19.

In the County Court of El Paso County, Texas, Probate Docket.

In the Estate of:
John Boyd Kilpatrick, Deceased.
No. 5497.

This, the 29th day of March, A. D. 1929, came on to be heard the sworn written application of L. H. Brandt, a resident of El Paso County, Texas, for the probate of a certain instrument in writing, dated the 19th day of April, 1917, and now produced in Court, being filed herein with said Application on the 12th day of February, 1929, purporting and alleged to be the last will of John Boyd Kilpatrick, Deceased, and due proof being taken in the manner required by law, and it being proved to the satisfaction of the Court that this Court has jurisidction of this Estate; that citation has been duly issued, served and returned in the manner and for the length of time required by law; that the Testator, John Boyd Kilpatrick, at the time of executing the said will was at least 21 years of age, was of sound mind and died on the 16th day of January, 1929, at El Paso, in El Paso County, Texas; that such Testator executed such will with the formalities and solemnities and under the circumstances required by law to make it a valid will; that the same has not been revoked by such Testator, and that it is entitled to probate, and it further appearing that the Applicant, L. H. Brandt, was named in said will as executor; that he is entitled by law to letters and is not disquali-

fied by law from accepting letters, and that there is a necessity for administration on said Estate;

It Is, Therefore, Ordered, Adjudged and Decreed that the said will on file herein be, and the same is hereby admitted to probate and record as the last will of the said John Boyd Kilpatrick, Deceased, and the testimony given in this proceeding shall be recorded in the minutes of this Court, and

It Is Further Ordered, Adjudged and Decreed that administration be granted upon the estate of the said John Boyd Kilpatrick, Deceased, and that said L. H. Brandt, Applicant herein, receive letters testamentary upon his taking the oath required by law, and when the said L. H. Brandt shall have qualified according to law, the Clerk of this Court will issue letters in accordance with this judgment, It is ordered that W. R. Piper, Sam Musser, and C. G. Mueller are herey appointed appraisers to appraise the estate.

E. B. McCLINTOCK,
Judge, Probate Court, El Paso
County, Texas.

A True and Correct Copy, I Hereby Certify, July 21, 1961.

J. W. FIELDS.
Clerk, County Court, El Paso
County, Texas.
By ANTONIO CHAVEZ.
Deputy.

(Seal)

County Clerk's Office of El Paso County, Texas, dated this 13 day of Oct., 1961.

I, J. W. Fields, County Clerk of El Paso County, Texas and Antonio Chavez, his deputy, further Certify that we are the officers who have the custody of the filed original official records from which these true Certified Copies were made and also we have the legal custody of these filed original official records.

In Testimony Whereof, we hereto set our hands and affix the seal of said office the day and date first above written.

J. W. FIELDS,
(J. W. Fields),
County Clerk of El Paso County, Texas,
ANTONIO CHAVEZ,
(Antonio Chavez),
Deputy

(Seal)

PLAINTIFF'S EXHIBIT No. 20.

54774.

Royalty Deed.

The State of California,
County of Los Angeles.

Know All Men By These Presents: That I, Margaret Bobadilla, joined by my husband, Louis Bobadilla, of the County of Los Angeles, State of California, for and in consideration of the sum of $10.00

and other considerations, cash in hand paid by D. G. Heineman, of El Paso, Texas, receipt of which is acknowledged, and the assumption by the said D. G. Heineman of one fourth of all the State and County taxes, and one fourth of all interest on the State debt on the lands hereinafter described, which may accrue in the future, do hereby grant, bargain, sell, convey, set over, assign and deliver unto the said D. G. Heineman of El Paso County, Texas, an undivided one fourth interest in and to my fifteen-sixteenths interest in and to all of the oil, gas and other minerals, and stone, sand, gravel and other building materials in, on and under, and that may be produced from the following described land, situate in El Paso County, Texas, to wit:

Section	Block	Certificate	Grantee.
235	S F	7230	L. E. Mundy.
236	S F	7231	do
238	S F	7233	do
253	S F	7246	C. A. Mundy.
254	S F	7247	do

together with right of ingress and egress at all times for the purpose of mining and drillig and exploring said lands, for oil, gas and other minerals, or stone, sand, gravel and other building materials, and removing the same therefrom;

And the said above described lands being now under oil and gas leases originally executed in favor of J. S. Meriwether, in which I retained one sixteenth royalty of all the oil and gas produced from said leases, it is understood and agreed that this sale is made subject to said leases, but cover and include

one fourth of all of my said one sixteenth oil and gas royalty and rental due and to be paid under the terms of said leases.

It is agreed and understood that one fourth of the money rentals which may be paid to extend the time in which a well may be begun under the terms of said leases, shall be paid to the said D. G. Heineman, and in the event that the above described leases, or either of them, for any reason become canceled or forfeited, then in that event, one fourth of the lease interests and all future rentals and royalties on said land, for oil, gas and all minteral privileges (in excess of the one sixteenth royalty due the State of Texas), together with one fourth interest in all future rentals, shall be owned by the said D. G. Heineman.

It is also understood that contracts may be made by which sand, gravel or stone for building material, or road material, may be sold, and that the said D. G. Heineman, by this instrument acquires an undivided one fourth interest in and to all proceeds of such contracts.

To Have and To Hold the above described property together with all and singular, the rights and appurtenances thereto in anywise belonging, unto the said D. G. Heineman, his heirs and assigns forever; and I do hereby bind myself, my heirs, executors and administrators, to warrant and forever defend, all and singular, the said property unto the said D. G. Heineman, his heirs and assigns, against every person whomsoever lawfully claming or to claim the same, or any part thereof.

Witness our hands this 14th day of August, 1931.

MARGARET BOBADILLA,
LOUIS BOBADILLA.

The State of Texas,
County of El Paso.

Before Me, the undersigned authority, on this day personally appeared Louis Bobadilla, to me known to me the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and notarial seal, this 14th day of August, 1931.

RETHA LEE LASSETER,
Notary Public, in and for El Paso County, Texas.

(Notarial Seal: County of El Paso, Texas.)

The State of California,
County of Los Angeles.

Before Me, the undersigned authority, on this day personally appeared Margaret Bobadilla, wife of Louis Bobadilla, known to me to be the person whose name is subscribed to the foregoing instrument, and having been examined by me privily and apart from her husband, and having the same fully explained to her, she, the said Margaret Bobadilla acknowledged such instrument to be her act and deed, and she declared that she had willingly signed the same for the purposes and consideration therein expressed, and that she did not wish to retract it.

Given under my hand and notarial seal, this 18th day of August, 1931.

ABBIE G. LOWRIE,
Notary Public, in and for Los Angeles County, California.

(Notarial Seal: Los Angeles Co., Cal.)

My Commission expires Dec. 20, 1931.

Filed for Record Sept. 9, 1931 at 10:46 A. M.

And Recorded Sept. 14, 1931 at 4:20 P. M.

W. D. GREET,
County Clerk,
By A. A. OSBORNE,
Deputy.

The State of Texas,
County of El Paso.

I, J. W. Fields, County Clerk in and for El Paso County, State of Texas, do hereby certify that the foregoing is a true and correct copy of the: Royalty Deed From, Margaret Bobadilla et ver to D. G. Heineman Dated the 14 day of Aug. 1931, as the same appears of record in the Deed Records of Said County in Volume 554 page 466 thereof.

Given under my hand and seal of office, at office at El Paso, Texas, this the 21 day of July A. D. 1961.

J. W. FIELDS,
County Clerk,
By ANTONIO CHAVEZ,
Deputy.

(Seal)

County Clerk's Office of El Paso County, Texas, dated this 13 day of Oct., 1961.

I, J. W. Fields, County Clerk of El Paso County, Texas and Antonio Chavez, his deputy, further Certify that we are the officers who have the custody of the filed original official records from which these true Certified Copies were made and also we have the legal custody of these filed original official records.

In Testimony Whereof, we hereto set our hands and affix the seal of said office the day and date first above written.

J. W. FIELDS,
(J. W. Fields),
County Clerk of El Paso County, Texas.
ANTONIO CHAVEZ,
(Antonio Chavez),
Deputy.

(Seal)

PLAINTIFF'S EXHIBIT No. 21.

57473.

Warranty Deed.

The State of California,
County of Los Angeles.

Know All Men By These Presents: That I, Margaret Bobadilla, joined by my husband, Louis Bovadilla, of the County of Los Angeles, State of California, for and in consideration of the sum of $10.00,

and other considerations, cash in hand paid by L. H. Brandt, of Dona Ana County, New Mexico, receipt of which is acknowledged, and the assumption by the said L. H. Brandt of one fourth of all the State and County taxes, and one fourth of the State debt, and interest thereon, on the lands hereinafter described, do hereby grant, sell and convey, unto the said L. H. Brandt of Dona Ana County, New Mexico, an undivided one fourth interest in and to the following described land, situate in El Paso County, Texas, to wit:

Section		Grantee
235	SF 7230	L. E. Mundy
236	SF 7231	do
238	SF 7233	do
253	SF 7246	C. A. Mundy
254	SF 7247	do

And the said above described lands being now under oil and gas leases originally executed in favor of J. S. Meriwether, in which I retained one sixteenth royalty of all the oil and gas produced from said leases, it is understood and agreed, that this sale is made subject to said leases, but covers and includes one fourth of all my said one sixteenth oil and gas royalty, and cash rentals, due and to be paid under the terms of said lease.

To Have and To Hold the above described property together with all and singular the rights and appurtenances thereto in anywise belonging, unto the said L. H. Brandt, his heirs and assigns forever; and we do hereby bind ourselves, our heirs, executors and administrators, to warrant and forever defend all

and singular the said property unto the said L. H. Brandt, his heirs and assigns, against every person whomsoever, lawfully claiming or to claim the same or any part thereof, except as against the one sixteenth mineral or royalty interest held by the State of Texas, subject to which, this deed is made.

Witness our hands, this 16th day of December, 1931.

MRS. MARGARET BOBADILLA.
LOUIS BOBADILLA.

The State of California,
County of Los Angeles.

Before me, the undersigned authority, on this day personally appeared Louis Bobadilla, and Margaret Bobadilla, his wife, both known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they each executed the same for the purposes and consideration therein expressed.

And the said Margaret Bobadilla, wife of Louis Bobadilla, having been examined by me privily and apart from her husband, and having the same fully explained to her, she, the said Margaret Bobadilla, acknowledged such instrument to be her act and deed, and she declared that she had willingly signed the same for the purposes and consideration therein expressed, and that she did not wish to retract it.

Given under my hand and notarial seal this 16th day of December, 1931.

ABBIE G. LOWRIE,
Notary Public in and for Los Angeles County, California.

(Notarial Seal, Los Angeles Co. Cal.)

Filed for Record Jan. 8, 1932 at 1:30 P. M.

And Recorded Jan. 12, 1932 at 2:00 P. M.
W. D. GREET,
County Clerk,
By IVA COCHRAN,
Deputy.

The State of Texas,
County of El Paso.

I, J. W. Fields, County Clerk in and for El Paso County, State of Texas, do hereby certify that the foregoing is a true and correct copy of the: Warranty Deed From Margaret Bobadilla to L. H. Brandt Dated the 16 day of Dec. 1931, as the same appears of record in the Deed Records of Said County in Volume 550 page 248 thereof.

Given under my hand and seal of office, at office in El Paso, Texas, this the 18 day of Aug. A. D. 1961.
J. W. FIELDS,
County Clerk,
By ANTONIO CHAVEZ,
(Seal) Deputy

County Clerk's Office of El Paso County, Texas, dated this 13 day of Oct., 1961.

I, J. W. Fields, County Clerk of El Paso County, Texas and Antonio Chavez, his deputy, further Certify that we are the officers who have the custody of the filed original official records from which these true Certified Copies were made and also we have

the legal custody of these filed original official records.

In Testimony Whereof, we hereto set our hands and affix the seal of said office the day and date first above written.

J. W. FIELDS,
(J. W. Fields),
County Clerk of El Paso County, Texas,
ANTONIO CHAVEZ,
(Antonio Chavez),
Deputy.

(Seal)

PLAINTIFF'S EXHIBIT No. 22.

91547.

Warranty Deed.

The State of California,
County of Los Angeles.
Know All Men By These Presents:

That I, Margaret Bobadilla, joined by my husband, Louis Bobadilla, of the County of Los Angeles, State of California, for an in consideration of the sum of $1000 and other valuable consideration to me in hand paid by D. G. Heindeman, receipt of which is acknowledged, and the assumption by the grantee of the following obligations against the land hereinafter described:

(a) Three-fourths (3/4ths) of all of the interest on the State debt, to and including November 1, 1940;

(b) One-half (1/2) of all the interest on the State debt from November 1, 1940;

(c) One-half (1/2) of all the State and County taxes accrued to date of this deed and hereafter accruing;

(d) One-half (1/2) of the State debt for the purchase price of said land;

have granted, sold and conveyed, and by these presents do grant, sell and convey, unto the said D. G. Heineman, of the County of El Paso, State of Texas, an undivided one-half (1/2) interest in and to the following described real estate, located in El Paso County, Texas, towit:

1. Section Two Hundred Thirty-five (235), S.F. 7230, Laura E. Mundy, Grantee, containing 293.4 acres.

2. Section Two Hundred Thirty-eight 238), S.F. 7233, Laura E. Mundy, Grantee, containing 640 acres.

3. Section Two Hundred Fifty-four (254), S.F. 7247, Clara A. Mundy, Grantee, containing 640 acres.

Together with one-half (1/2) of the land owner's rental and royalty under any oil and gas lease now on said land.

The assumption by the grantee of a portion of the above obligations against said land shall be construed

as a separate contract as to each section as a separate transaction, as tho separate deeds were executed for each tract, and the assumption of the obligations on one section shall not affect nor be affected by nor be construed as a lien on any other section.

To Have and To Hold the above described premises, together with all and singular the rights and appurtenances thereto in anywise belonging unto the said D. G. Heineman, his heirs and assigns forever and I do hereby bind myself, my heirs, executors and administrators, to warrant and forever defend, all and singular the said premises unto the said D. G. Heineman, his heirs and assigns, against every person whomsoever lawfully claiming, or to claim the same, or any part thereof.

Witness our hands this 21st day of July, 1941.

MARGARET BOBADILLA,
LOUIS BOBADILLA.

The State of California,
County of Los Angeles.

Before Me, the undersigned authority, on this day personally appeared Louis Bobadilla and Margaret Bobadilla, his wife, both known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they each executed the same for the purposes and consideration therein expressed, and the said Margaret Bobadilla, wife of the said Louis Bobadilla, having been examined by me privily and apart from her husband, and having the same fully explained to her, she, the said Margaret Bobadilla acknowledged such instru-

ment to be her act and deed, and she declared that she had willingly signed the same for the purposes and consideration therein expressed, and that she did not wish to retract it.

Given Under My Hand and Notarial Seal 4th day of August, 1941.

ANNA S. FINE,
(Seal) Notary Public in and for Los Angeles County, California.

My Commission Expires Sept. 19, 1944.

No. 91547 Warranty Deed, Margaret Bobadilla, Louis Bobadilla, to D. G. Heineman. Filed for Record in El Paso County, Texas, Jul. 16, 1947 at 3 o'clock P.M. and Recorded July 21, 1947 at 9 o'clock A.M. P. D. Lowry, County Clerk, by W. T. Duncan, Deputy. July 21/41.

The State of Texas,
County of El Paso

I, J. W. Fields, County Clerk in and for El Paso County, State of Texas, do hereby certify that the foregoing is a true and correct copy of the: Warranty Deed From Margaret Bobadilla et vir to D. G. Heineman Dated the 21 day of July 1941, as the same appears of record in the Deed Records of Said County in Volume 868 page 575 thereof.

Given under my hand and seal of office, at office in El Paso, Texas, this the 21 day of July, A. D. 1961.

J. W. FIELDS,
County Clerk,
By ANTONIO CHAVEZ,
(Seal) Deputy.

County Clerk's Office of El Paso County, Texas, dated this 13 day of Oct., 1961.

I, J. W. Fields, County Clerk of El Paso County, Texas and Antonio Chavez, his deputy, further Certify that we are the officers who have the custody of the filed original official records from which these true Certified Copies were made and also we have the legal custody of these filed original official records.

In Testimony Whereof, we hereto set our hands and affix the seal of said office the day and date first above written.

J. W. FIELDS,
(J. W. Fields),
County Clerk of El Paso County, Texas.
ANTONIO CHAVEZ,
(Antonio Chavez),
Deputy.

(Seal)

PLAINTIFF'S EXHIBIT No. 23,

Nos. 23A, 23B, HEINEMAN, Nos. 23C, 23D, BOBADILLA.

6806-2.

Duplicate Receipt.
(To be Kept by Land Office)

Ledger 91.
Page 561.
File No. 112121.
Posted Post Office El Paso, Tex. 11-30, 1932.

To The Commissioner General Land Office, Austin, Texas. 4005 Moreland Ave.

I enclose (Say whether Money Order or Draft on a Bank in Austin, or Cash.) C. Chk. for $9713, payable to the "State Treasurer", of which ($..... are for principal $12.32, 62 P.I are for interest $1344) payment on the following land purchased from the State by ....., towit:

Section 235.
Block .....
Township .....
Certificate S.F. 7230.
Grantee L. E. Mundy.
Acres 292
County El Paso 12-1-32.
It is (Say whether School, Asylum, or University) School Land.
(Name of Sender) Mrs. Margaret Bobadilla.

.....,
Commissioner General Land Office.

General Land Office, Austin, Texas, October 18, 1961.

I, Jerry Sadler, Commissioner of the General Land Office of the State of Texas, do hereby certify that on the reverse side hereof is a true and correct copy of the original of this instrument now on file in this office together with all indorsements thereon and further certify that I am the officer who has the custody of the filed original official records from which these true Certified Copies were made.

In Testimony Whereof, I, hereunto set my hand and affix the seal of said office the day and date first above written.

JERRY SADLER,
(Jerry Sadler),
Commissioner of the General Land Office.

(Seal)

11602-2.

Duplicate Receipt.
(To be Kept by Land Office)

Ledger 91.
Page 561.
File No. 112121.
Posted Post Office El Paso, Texas 2-13-1934.
To The Commissioner General Land Office, Austin, Texas. 2311 Tremont St.

I enclose (Say whether Money Order or Draft on a Bank in Austin, or Cash.) (Illegible) for $77.03, payable to the "State Treasurer," of which ($.81 are for

principal $12.42 are for interest 13.23 payment on the following land purchased from the State by ....., towit:

Section 235.
Block .....
Township .....
Certificate 7230.
Grantee Laura E. Mundy.
Acres 292.
County El Paso. 2-17-34.
It is (Say whether School, Asylum, or University) School Land.
(Name of Sender) Margaret Bobadilla.

....., Commissioner General Land Office.

General Land Office, Austin, Texas, October 18, 1961.

I, Jerry Sadler, Commissioner of the General Land Office of the State of Texas, do hereby certify that on the reverse side hereof is a true and correct copy of the original of this instrument now on file in this office together with all indorsements thereon and further certify that I am the officer who has the custody of the filed original official records from which these true Certified Copies were made.

In Testimony Whereof, I, hereunto set my hand and affix the seal of said office the day and date first above written.

JERRY SADLER,
(Jerry Sadler),
Commissioner of the General Land Office.

(Seal)

14671.

Duplicate Receipt.
(To be Kept by Land Office)

Bascom Giles, Commissioner.
Alvis Vandygriff, Chief Clerk.

Ledger 171.
Page 468.
File No. 112121.
Posted Post Office El Paso, Tex., 1943.
To The Commissioner General Land Office, Austin, Texas.

I enclose (Say whether Money Order or Draft on a Bank in Austin, or Cash.) C. Ck. for $37.97, of which ($..... are for principal $37.97 are for interest ..... are for $.....fees. payment on the following land purchased from the State, to-wit:

Section 235.
Block .....
Township .....
Certificate SF 7230.
Survey L. E. Mundy.
Acres 292.
County El Paso. 2-26-43.
(Name of Sender) D. G. Heineman.
(Address) 207 El Paso Nat. Bk. Bld.

Received remittance as stated above.

.....
Commissioner General Land Office.

General Land Office, Austin, Texas, October 18, 1961.

I, Jerry Sadler, Commissioner of the General Land Office of the State of Texas, do hereby certify that on the reverse side hereof is a true and correct copy of the original of this instrument now on file in this office together with all indorsements thereon and further certify that I am the officer who has the custody of the filed original official records from which these true Certified Copies were made.

In Testimony Whereof, I, hereunto set my hand and affix the seal of said office the day and date first above written.

JERRY SADLER,
(Jerry Sadler),
Commissioner of the General Land Office.

(Seal)

44.

Duplicate Receipt.
(To be Kept by Land Office)

Ledger 171.
Page 468.
File No. 112121.
Posted Post Office El Paso, Tex 8/30, 19...

To the Commissioner General Land Office, Austin, Texas. 207 El Paso Nat. Bank Bldg.

I enclose (Say whether Money Order or Draft on a Bank in Austin, or Cash.) Cck. for $39.35, payable to the "State Treasurer," of which ($ ..... are

for principal $39.35 are for interest) payment on the following land purchased from the State by ....., to-wit:

Section 235.
Block .....
Township .....
Certificate SF 7230.
Grantee Laura E. Munday.
Acres 292.
County El Paso. 9/2/41.

It is (Say whether School, Asylum, or University) School Land.

(Name of Sender) D. G. Heineman.

....,
Commissioner General Land Office.

General Land Office, Austin, Texas, October 18, 1961.

I, Jerry Sadler, Commissioner of the General Land Office of the State of Texas, do hereby certify that on the reverse side hereof is a true and correct copy of the original of this instrument now on file in this office together with all indorsements thereon and further certify that I am the officer who has the custody of the filed original official records from which these true Certified Copies were made.

In Testimony Whereof, I, hereunto set my hand and affix the seal of said office the day and date first above written.

JERRY SADLER,
(Jerry Sadler),
(Seal) Commissioner of the General Land Office.

PLAINTIFF'S EXHIBIT No. 24.

1685

207 El Paso National Bank Bldg.,
El Paso, Texas.
February 25, 1943.

Mr. Bascom Giles,
Commissioner General Land Office,
Austin, Texas.

Dear Sir:

I enclose herewith cashier's check on El Paso National Bank, No. 259783 for $37.97 to cover one-third of interest due on Section 235, S. F. 7230, Laura E. Mundy, Grantee, El Paso County;

Also cashier's check No. 255781 for $86.19 to cover one-third of the interest due on Section 238, S. F. 7233, Laura E. Mundy, Grantee, El Paso County;

Also cashier's check No. 259782 for $85.60 to cover one-third of interest due on Section 254, S.F. 7247, Clara A. Mundy, Grantee, El Paso County;

Also cashier's check No. 259779 for $86.12 to cover one-third of interest due on Section 26, Block 79, Twp., 2, El Paso County;

Also cashier's check No. 259780 for $86.12 to cover one-third of interest due on Section 34, Block 79, Twp. 2, El Paso County.

This is in compliance with previous correspondence concerning this matter.

I will mail checks no later than March 15th on the following lands:

Survey 245, S.F. 7224 N: D. Mundy, Grantee; also The S. W. 1/4 and the E. 1/2 of S. E. 1/4 of Survey 237 S.F. 7232, Laura E. Mundy, Grantee, and
The N. 1/2 of Survey 240 S.F. 7219, N. D. Mundy, Grantee.

Hoping this will be satisfactory I remain,
Respectfully,
D. G. HEINEMAN

General Land Office, Austin, Texas, October 18, 1961.

I, Jerry Sadler, Commissioner of the General Land Office of the State of Texas, do hereby certify that on the reverse side hereof is a true and correct copy of the original of this instrument now on file in this office together with all indorsements thereon and further certify that I am the officer who has the custody of the filed original official records from which these true Certified Copies were made.

In Testimony Whereof, I, hereunto set my hand and affix the seal of said office the day and date first above written.

JERRY SADLER,
(Jerry Sadler),
Commissioner of the General Land Office.

(Seal)

PLAINTIFF'S EXHIBIT No. 25.

May 1, 1947

D. G. Heineman Estate
El Paso National Bank Bldg.
El Paso, Texas

Re: Part Section 235, Laura E. Munday, 292 acres in El Paso County.

Gentlemen:

The records of this office reflect that you have made payments on the above described lands, on which there is a sum of $136.08 due as interest and penal interest to November 1, 1946.

If you are the present owner and are desirous of protecting your rights in this acreage, it will be necessary that remittance of the above amount, together with penal interest at the rate of 5% per annum, calculated from November 1, 1946 to date of payment, be made to avoid forfeiture of the account on July 1, 1947. Unless I have received payment prior to that date, it will be presumed that you are not further interested in this land, and this will serve as my notice of forefeiture on the above stated date.

Sincerely yours,
BASCOM GILES,
Commissioner of the General Land Office.

CRL:pd
File: 112121

General Land Office, Austin, Texas, October 18, 1961.

I, Jerry Sadler, Commissioner of the General Land Office of the State of Texas, do hereby certify that on the reverse side hereof is a true and correct copy of the original of this instrument now on file in this office together with all indorsements thereon and further certify that I am the officer who has the custody of the filed original official records from which these true Certified Copies were made.

In Testimony Whereof, I, hereunto set my hand and affix the seal of said office the day and date first above written.

JERRY SADLER,
(Jerry Sadler),
Commissioner of the General Land Office.

(Seal)

PLAINTIFF'S EXHIBIT No. 26.

General Land Office
State of Texas
Austin

Bascom Giles, Commissioner
Alvis Vandygriff, Chief Clerk

July 22, 1947

D. G. Heineman Estate
El Paso National Bank Building
El Paso, Texas

Re: Part Section 235, Laura E. Munday, 292 Acres in El Paso County.

Gentlemen:

This is to advise you that the above acreage was forfeited on the records of this office as of July 21, 1947, for non-payment of interest.

In order that you may have complete information regarding recent legislation governing reinstatement of forfeited accounts, I enclose herewith a summary of House Bill No. 56 of the 47th Legislature.

In making inquiry regarding this land, it will be necessary that you give the full description as shown above.

Sincerely yours,
BASCOM GILES,
(Bascom Giles),
Commissioner of the General Land Office.

CRL:emp
File: 112121
encl.

Returned Unclaimed.

General Land Office, Austin, Texas, October 18, 1961

I, Jerry Sadler, Commissioner of the General Land Office of the State of Texas, do hereby certify that on the reverse side hereof is a true and correct copy of the original of this instrument now on file in this office together with all indorsements thereon and further certify that I am the officer who has the custody of the filed original official records from which these true Certified Copies were made.

In Testimony Whereof, I, hereunto set my hand and affix the seal of said office the day and date first above written.

JERRY SADLER,
(Jerry Sadler),
Commissioner of the General Land Office.

(Seal)

PLAINTIFF'S EXHIBIT

No. 27

BASCOM GILES
COMMISSIONER
GENERAL LAND OFFICE
AUSTIN 14 TEXAS

OFFICIAL BUSINESS
STATE OF TEXAS
STATE PENALTY
FOR PRIVATE USE

AUSTIN TEXAS JUL 22 '67 .03

The D. G. Holloman Estate
[illegible] El Paso National Bank Building
El Paso, Texas

General Land Office, Austin, Texas, October 18, 1961.

I, Jerry Sadler, Commissioner of the General Land Office of the State of Texas, do hereby certify that on the reverse side hereof is a true and correct copy of the original of this instrument now on file in this office together with all indorsements thereon and further certify that I am the officer who has the custody of the filed original official records from which these true Certified Copies were made.

In Testimony Whereof, I, hereunto set my hand and affix the seal of said office the day and date first above written.

JERRY SADLER,
(Jerry Sadler),
(Seal) Commissioner of the General Land Office.

PLAINTIFF'S EXHIBIT No. 28.

85495.

Quit Claim Deed—With Single, Joint and Wife's Separate Acknowledgments.

The State of Michigan,
County of Alger.
Know All Men By These Presents:

That Tella H. Heineman, a widow, of the County of Alger and State of Michigan, for and in consideration of the sum of Ten Dollars, to me in hand paid by Greenberry Simmons, Ky. Home Life Bldg., Louis-

ville, Ky. of the County of Jefferson and State of Kentucky, the receipt of which is hereby acknowledged, do, by these presents, Bargain, Sell, Release, and Forever Quit Claim unto the said Greenberry Simmons his heirs and assigns, all my right title and interest in and to that certain tract or parcel of land lying in the County of El Paso and State of Texas, described as follows, to-wit:

North half; Survey 240, Nellie D. Mundy, original grantee, Scrap File 7219, Abstract 9932, Containing 328.65 acres, more or less.

Survey 235, Laura E. Mundy, original grantee, Scrap File 7230, Containing 292 acres, more or less.

To Have and To Hold the said premises, together with all and singular the rights, privileges and appurtenances thereto in any manner belonging unto the said Greenberry Simmons, his heirs and assigns, forever, so that neither Tella H. Heineman the said nor her heirs, nor any person or persons claiming uder her shall, at any time hereafter, have, claim or demand any right or title to the aforesaid premises or appurtenances, or any part thereof.

Erasures and Interlineations noted before execution.

Witness my hand at Munising, Michigan this 10th day of June A. D. 1952.

TELLA H. HEINEMAN,
(Tella H. Heineman),
Individually and as heir of
D. G. Heineman, deceased.

Witnesses at Request of Grantor:
ETHEL JOSLIN.
(Seal)

Single Acknowledgment.

The State of Michigan,
County of Alger.

Before Me, the undersigned, a Notary Public, in and for said County, Michigan, on this day personally appeared Tella H. Heineman known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the same for the purposes and consideration therein expressed.

Given Under My Hand and Seal of Office, This 10 day of June, A. D. 1952.

(Seal)

CLIFFORD T. EBBESON,
Notary Public, Alger Co., Michigan.

Comm. expires Aug. 11-54.

No. 85495 Quit Claim Deed With Single, Joint and Wife's Separate Acknowledgments From Tella H. Heineman To Greenberry Simmons Filed For Record Jul. 14, 1952 at 9:10 o'clock A.M. Raymond L. Telles, Jr., County Clerk, El Paso Co., Texas, By W. T. Duncan, Deputy. This instrument should be filed immediately with the County Clerk for record.

The State of Texas,
County of El Paso.

I, J. W. Fields, County Clerk in and for El Paso County, State of Texas, do hereby certify that the foregoing is a true and correct copy of the: Quit Claim Deed From Tella H. Heineman to Greenberry Simmons Dated the 10 day of June 1952, as the same appears of record in the Deed Records of Said County in Volume 1077 page 540 thereof.

Given under my hand and seal of office, at office in El Paso, Texas, this the 2 day of Oct. A. D. 1961.

J. W. FIELDS,
County Clerk,
By ANTONIO CHAVEZ,
(Seal) Deputy

County Clerk's Office of El Paso County, Texas, dated this 2 day of Oct., 1961.

I, J. W. Fields, County Clerk of El Paso County, Texas and Antonio Chavez, his deputy, further Certify that we are the officers who have the custody of the filed original official records from which these true Certified Copies were made and also we have the legal custody of these filed original official records.

In Testimony Whereof, we hereto set our hands and affix the seal of said office the day and date first above written.

J. W. FIELDS,
(J. W. Fields),
County Clerk of El Paso
County, Texas.
ANTONIO CHAVEZ,
(Antonio Chavez),
(Seal) Deputy.

PLAINTIFF'S EXHIBIT No. 29.

85493.

Affidavit of Heirship of D. G. Heineman, deceased.

State of Michigan,
County of Alger.

Tella H. Heineman, widow, of Alger County, Michigan, states upon oath that her husband D. G. Heineman died intestate several years ago and that she and her son, D. H. Heineman are the only heirs at law of D. G. Heineman, deceased.

TELLA H. HEINEMAN,
(Tella H. Heineman).

Sworn to and subscribed before me this 10 day of June, 1952.

CLIFFORD T. EBBESON,
(Seal) Notary Public of Alger Co., Michigan.

My Commission expires August 11-1954.

32008 Filed for Record June 24, 1952 at 1 o'clock P.M. Martha L. McLure, Clerk County Court, Hudspeth Co., Tex., By Martha L. McLure, Deputy.

The State of Texas,
County of Hudspeth

I, Martha L. McLure Clerk of the County Court in and for said County, do hereby certify that the foregoing Affidavit of Heirship dated the 10th day of June, 1952, with its certificate of authentication, was filed for Record in my office, the 24 day of

June, 1952, at 1 o'clock P.M., and duly Recorded the 24th day of June, 1952, at 3:45 o'clock P.M., in Deed Record of said County, in Vol. 54 on Page 101.

Witness my hand and the seal of the County Court of said County, at office in Sierra Blanca, Texas, the day and year first above written.

MARTHA L. McLURE,
Clerk County Court Hudspeth County,
By .....,
Deputy.

85493 Aff. Tella H. Heineman as to D. G. Heineman, dec'd. Filed for Record Jul. 14, 1952 at 9:10 o'clock A.M. Raymond L. Telles, Jr., County Clerk, El Paso Co., Texas, By W. T. Duncan, Deputy.

The State of Texas,
County of El Paso.

I, J. W. Fields, County Clerk in and for El Paso County, State of Texas, do hereby certify that the foregoing is a true and correct copy of the: Affidavit of Heirship as to D. G. Heineman Deceased Dated the 10 day of June 1952, as the same appears of record in the Deed Records of Said County in Volume 1077 page 469 thereof.

Given under my hand and seal of office, at office in El Paso, Texas, this the 2 day of Oct. A. D. 1961.

J. W. FIELDS,
County Clerk,
By ANTONIO CHAVEZ,
Deputy.

(Seal)

County Clerk's Office of El Paso County, Texas, dated this 2 day of Oct., 1961.

I, J. W. Fields, County Clerk of El Paso County, Texas and Antonio Chavez, his deputy, further Certify that we are the officers who have the custody of the filed original official records from which these true Certified Copies were made and also we have the legal custody of these filed original official records.

In Testimony Whereof, we hereto set our hands and affix the seal of said office the day and date first above written.

J. W. FIELDS,
(J. W. Fields),
County Clerk of El Paso County, Texas,
ANTONIO CHAVEZ,
(Antonio Chavez),
Deputy.

(Seal)

PLAINTIFF'S EXHIBIT No. 30.

85494

The State of Nevada,
County of Clark.

Know All Men By These Presents:

That D. H. Heineman, unmarried of the County of Clark and State of Nevada, for and in consideration of the sum of Ten Dollars, to me in hand paid by Greenberry Simmons, Ky. Home Life Bldg., Louis-

ville 2, Ky. of the County of Jefferson and State of Kentucky, the receipt of which is hereby acknowledged, do, by these presents, Bargain, Sell, Release, and Forever Quit Claim unto the said Greenberry Simmons his heirs and assigns, all my right title and interest in and to that certain tract or parcel of land lying in the County of El Paso and State of Texas, described as follows, to-wit:

North half, Survey 240, Nellie D. Mundy, original grantee, Scrap File 7219, Abstract 9932, Containing 328.65 acres more of less.

All of Survey 235, Laura E. Mundy, original grantee, Scrap File 7230, Containing 292 acres, more or less.

To Have and to Hold the said premises, together with all and singular the rights, privileges and appurtenances thereto in any manner belonging unto the said Greenberry Simmons his heirs and assigns, forever, so that neither D. H. Heineman the said nor his heirs, nor any person or persons claiming under him shall, at any time hereafter, have, claim or demand any right or title to the aforesaid premises or appurtenances, or any part thereof. Erasures and Interlineations noted before execution.

Witness my hand at Las Vegas, Nevada this 18th. day of June A.D. 1952.

D. H. HEINEMAN,
(D. H. Heineman),
Individually, and as heir of
D. G. Heineman, deceased.

Witnesses at Request of Grantor:

.....

.....

No. 85494 Quit Claim Deed With Single, Joint and Wife's Separate Acknowledgments from D. H. Heineman, (Illegible) etc. to Greenberry Simmons. Filed for Record Jul. 14, 1952, County Clerk. At 9:10 O'Clock A.M. Raymond L. Telles, Jr., Deputy County Clerk, El Paso Co., Texas. Recording Fee $..... By W. H. Duncan Deputy. This instrument should be filed immediately with the County Clerk for record.

The State of Texas,
County of El Paso.

I, J. W. Fields, County Clerk in and for El Paso County, State of Texas, do hereby certify that the foregoing is a true and correct copy of the: Quit Claim Deed From D. H. Heineman to Greenberry Simmons Dated the 18 day of June 1952, as the same appears of record in the Deed Records of Said County in Volume 1077 page 539 thereof.

Given under my hand and seal of office, at office in El Paso, Texas, this the 2 day of Oct. A.D., 1961.

J. W. FIELDS,
County Clerk,
By ANTONIO CHAVEZ,
Deputy.

(Seal)

Single Acknowledgment.

The State of Nevada,
County of Clark.

Before Me the undersigned, a Notary Public, in and for said County, Nevada, on this day personally

appeared D. H. Heineman, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given Under my Hand and Seal of Office, This 12th. day of June, A. D. 1952.

C. L. FLEMING,
Notary Public, Clark Co.
Nevada. (Seal).

My Commission expires this 25 day of March, 1955.

County Clerk's Office of El Paso County, Texas, dated this 2 day of Oct., 1961.

I, J. W. Fields, County Clerk of El Paso County, Texas and Antonio Chavez, his deputy, further Certify that we are the officers who have the custody of the filed original official records from which these true Certified Copies were made and also we have the legal custody of these filed original official records.

In Testimony Whereof, we hereto set our hands and affix the seal of said office in the day and date first above written.

J. W. FIELDS,
(J. W. Fields),
County Clerk of El Paso
County, Texas,
ANTONIO CHAVEZ,
(Antonio Chavez),
Deputy.

(Seal)

PLAINTIFF'S EXHIBIT No. 31.

85492

Affidavit of Heirship of D. G. Heineman, deceased.

State of Nevada,
County of Clark.

D. H. Heineman, of Clark County, Nevada, after being duly sworn states upon oath that his father, D. G. Heineman died intestate several years ago and that he and his mother, Tella H. Heineman, widow, of D. G. Heineman, are the only heirs at law of D. G. Heineman deceased.

D. H. HEINEMAN,
(D. H. Heineman).

Sworn to and subscribed before me this 18th day of June, 1952.

C. L. FLEMING,
(Seal) Notary Public, Clark Co. Nevada.

My Commission expires March 25, 1955.

The State of Texas,
County of El Paso.

I, J. W. Fields, County Clerk in and for El Paso County, State of Texas, do hereby certify that the foregoing is a true and correct copy of the: Affidavit of Heirship as to D. G. Heineman Deceased. Dated the 18 day of June, 1952, as the same appears of record in the Deed Records of Said County in Volume 1077 page 467 thereof.

Given under my hand and seal of office, at office in El Paso, Texas, this the 2 day of Oct. A.D., 1961.

J. W. FIELDS
County Clerk,
By ANTONIO CHAVEZ,
Deputy.

(Seal)

Filed for record June 24, 1952 at 1 o'clock P.M. Martha L. McLure, Clerk, County Court, Hudspeth Co., Tex. By ..... Deputy.

The State of Texas,
County of Hudspeth.

I, Martha L. McLure Clerk of the County Court in and for said County, do hereby certify that the foregoing Affidavit of Heirship Dated the 18th day of June, 1952, with its certificate of authentication, was filed for Record in my office, the 24th day of June, 1952, at 1 o'clock P.M. and duly Recorded the 24th day of June, 1952, at 4 o'clock P.M., Deed Record of said County, in Vol. 54 on Page 101.

Witness my hand and the seal of the County Court of said County at office in Sierra Blanca, Texas, the day and year last above written.

MARTHA L. McLURE,
Clerk, County Court Hudspeth County,
By .....,
Deputy.

(Seal)

85492 Aff. D. H. Heineman as to D. G. Heineman, dec'd. Filed for Record Jul. 14, 1952, at 9:10 o'clock A. M. Raymond L. Tellers Jr., County Clerk, El Paso Co., Texas By W. T. Duncan Deputy.

County Clerk's Office of El Paso County Texas, dated this 2 day of Oct.

I, J. W. Fields, County Clerk of El Paso County, Texas and Antonio Chavez, his deputy, further Certify that we are the officers who have the custody of the filed original official records from which these ture Certified Copies were made and also we have the legal custody of these filed original official records.

In Testimony Whereof, we hereto set our hands and affix the seal of said office the day and date first above written.

J. W. FIELDS,
(J. W. Fields),
County Clerk of El Paso
County, Texas,
ANTONIO CHAVEZ,
(Antonio Chavez),
Deputy.

(Seal)

PLAINTIFF'S EXHIBIT No. 32.

July 24, 1952.

Mr. Greenberry Simmons
Western Lodge
Box 647
Van Horn, Texas

Dear Mr. Simmons:

This is in reply to your telephone conversation with Mr. Leggott on July 21, 1952 in regard to the rein-

statement of Section 235, L. E. Munday Survey, and the N/2 of Section 240, N. D. Mundy Survey, both in El Paso County. Texas.

With reference to the reinstatement of forfeited accounts as set out under the provisions of Article 5326, Revised Civil Statutes, in order to reinstate a forfeited account, the forfeiting owner, his heirs or assigns, must exercise such right within five years from the date of forfeiture. To exercise such rights the application to reinstate and also payment of all interest and penalty must be received in the five year period.

In considering this matter, our attorneys have decided to reject the applications to reinstate the above described lands and the applications were not received until July 23. Due to this fact, your applications are being returned together with your two payments received on July 23.

I am also returning your application to reinstate Section 24, Block 70, Township 1, in Hudspeth County together with your check in the amount of $1,158.11 and a signed check for blank amount.

Sincerely yours,

BASCOM GILES,
Commissioner of the General Land Office

CRL:jw
Encs.

General Land Office, Austin, Texas October 18, 1961.

I, Jerry Sadler, Commissioner of the General Land Office of the State of Texas, do hereby certify that on the reverse side hereof is a true and correct copy of the original of this instrument now on file in this

office together with all indorsements thereon and further certify that I am the officer who has the custody of the filed original official records from which these true Certified Copies were made.

In Testimony Whereof, I, hereunto set my hand and affix the seal of said office the day and date first above written.

JERRY SADLER,
(Jerry Sadler),
Commissioner of the General Land Office.

(Seal)

PLAINTIFF'S EXHIBIT No. 32A.

General Land Office State of Texas, Austin 14.

Bascom Giles, Commissioner
Dennis Wallace, Chief Clerk

July 24, 1952

Mr. Greenberry Simmons
Western Lodge
Box 647
Van Horn, Texas

Dear Mr. Simmons:

This is in reply to your telephone conversation with Mr. Leggott on July 21, 1952 in regard to the reinstatement of Section 235, L. E. Mundy Survey, and the N/2 of Section 240, N. D. Mundy Survey, both in El Paso County, Texas.

With reference to the reinstatement of forfeited accounts as set out under the provisions of Article 5326, Revised Civil Statutes; in order to reinstate a forfeited account, the forfeiting owner, his heirs or assigns, must exercise such right within five years from the date of forfeiture. To exercise such rights the application to reinstate and also payment of all interest and penalty must be received in the five year period.

In considering this matter, our attorneys have decided to reject the applications to reinstate the above described lands and the applications were not received until July 23. Due to this fact, your applications are being returned together with your two payments received on July 23.

I am also returning your application to reinstate Section 24, Block 70, Township 1, in Hudspeth County together with your check in the amount of $1,158.11 and a signed check for blank amount.

Sincerely yours,

BASCOM GILES

(Bascom Giles),

Commissioner of the General Land Office

CRL:jw
Encs.

THE GENERAL LAND OFFICE
STATE OF TEXAS

[illegible]
BASCOM GILES, COMMISSIONER
OF THE GENERAL LAND OFFICE, AUSTIN, TEXAS

STATE OF TEXAS
[illegible]

Before me, the undersigned authority, on this day personally appeared Greenberry Simmons who, upon his oath, by me duly sworn, deposes and says that he is the owner or legal representative of Greenberry Simmons, Ky. Home Life Bldg., Louisville, Ky. (Name) (Address) the owner of the following described land in El Paso County, Texas:

Survey	Block	Abstract	Patentee	Acres
K/2 of Survey 240	S.P.R.R.	9932	Nellie D.Mundy	328:65

That the above land has been forfeited for nonpayment of interest and affiant hereby tenders all delinquent interest and requests that this tract be reinstated in accordance with the provisions of Article 5326 of the Revised Civil Statutes of 1925.

[illegible]
Ky.Home Life Bldg.,Louisville,Ky.
(Address)

Sworn to and subscribed before me this [illegible] day of [illegible] A.D. 19[illegible]

(SEAL)

[illegible]
Notary Public in and for the County of [illegible] State of Texas

PLAINTIFF'S EXHIBIT
NO.32B
ORIGINAL IN
COURT SAFE

LOUISVILLE, KY. 7-16 19[illegible] NO [illegible]

CITIZENS FIDELITY BANK AND TRUST COMPANY 21-19/800

PAY TO THE [illegible]

who upon being duly sworn states on ... Greenberry Simmons, Ky. Home Life Bldg., Louisville, Ky.
or legal representative of ... (Name) (Address), the owner of the following
described land in El Paso County, Texas:

Survey	Blk	Twp	Cert	Grantee	Acres
N/2 of Survey 240	B.F.7219		Abstract 9932	Nellie D. Mundy	328.65

That the above land has been forfeited for nonpayment of interest and affiant hereby tenders all delinquent interest ... and requests that this tract be reinstated in accordance with the provisions of Article 5326 of the ... Statutes of 1925.

147016

Greenberry Simmons [illegible] Affiant

Ky. Home Life Bldg., Louisville, Ky. Address

Sworn to and subscribed before me this 17th day of July A. D. 19[illegible]

(SEAL) Frankie Hacker Co. Clerk
Notary Public in and for the County of
Culberson, State of Texas.
By Virginia Torres, Deputy

PLAINTIFF'S EXHIBIT
NO. 32B
ORIGINAL IN
COURT SAFE

LOUISVILLE, KY., 7-18 19[illegible] NO. [illegible]

CITIZENS FIDELITY BANK AND TRUST COMPANY 21-10/550

PAY TO THE ORDER OF General Land Office $430.00

Four hundred thirty and 00/100 DOLLARS

FOR Interest for reinstatement of N/2 survey 240 Nellie D. Mundy grantee of Patent

Greenberry Simmons

PLAINTIFF'S EXHIBIT
NO. 32 C
ORIGINAL IN
COURT SAFE

15

THE GENERAL LAND OFFICE

STATE OF TEXAS

BASCOM GILES, Commissioner
LYONS WALLACE, Chief Clerk

TO BASCOM GILES, COMMISSIONER
OF THE GENERAL LAND OFFICE, AUSTIN, TEXAS

STATE OF TEXAS,
County of Culberson

Before me, the undersigned authority, on this day personally appeared Greenberry Simmons who upon being duly sworn states on oath: That he is the owner or legal representative of Greenberry Simmons, Ky. Home Life Bldg. Louisville, Ky. (Name) (Address) the owner of the following described land in El Paso County, Texas:

No.	Blk.	Twp.	Grantee	Acres
All of Survey 235	S.F.7230		Laura E. Mundy	292

That the above land has been forfeited for nonpayment of interest and affiant hereby tenders all delinquent interest and requests that this tract be reinstated in accordance with the provisions of Article 5326 of the Revised Civil Statutes of 1925.

Greenberry Simmons
Affiant

Ky. Home Life Bldg., Loisville, Ky.
Address

Sworn to and subscribed before me this 7th day of July A. D. 19 52

(SEAL)

Notary Public in and for the County of Culberson, State of Texas

PLAINTIFF'S EXHIBIT
NO. 32 D
ORIGINAL IN
COURT SAFE

LOUISVILLE, KY., 7-18 1952 No. [illegible]

CITIZENS FIDELITY BANK AND TRUST COMPANY 21-10/500

PAY TO THE ORDER OF General Land Office $ 251.62

Two hundred fifty one and 62/100 ———— DOLLARS

of Texas, representative of (Name) (Address) , and owner of the following described land in El Paso County, Texas:

Sec	Blk	Twp	Cert	Grantee	Acres
All of Survey 235	S.F.7230			Laura E. Mundy	292

That the above land has been forfeited for nonpayment of interest and affiant hereby tenders all delinquent interest and requests that this tract be reinstated in accordance with the provisions of Article 5328 of the Revised Civil Statutes of 1925.

Galenburg Simmons
Affiant

Ky. Home Life Bldg., Louisville, Ky.
Address

Sworn to and subscribed before me this 7th day of July A. D. 19 52

(SEAL)

Fred Walker, Co. Clerk
Notary Public in and for the County of Jefferson, State of Texas.
By Lyman Henry Deputy

PLAINTIFF'S EXHIBIT
NO. 32 D
ORIGINAL IN
COURT SAFE

LOUISVILLE, KY. 7-18 1952 No. [illegible]

CITIZENS FIDELITY BANK AND TRUST COMPANY 21-10/500

PAY TO THE ORDER OF General Land Office $ 251.62

Two hundred fifty one and 62/100 ———— DOLLARS

FOR Interest for reinstatement of survey 235, Laura E Mundy, grantee El Paso Co.

Galenburg Simmons

PLAINTIFF'S EXHIBIT
NO. 32 E
ORIGINAL IN
COURT SAFE

PLAINTIFF'S EXHIBIT
NO. 32F
ORIGINAL IN
COURT SAFE

PLAINTIFF'S EXHIBIT
NO. 32 G
ORIGINAL IN
COURT SAFE

LOUISVILLE, KY., 7-16 19 5[illegible] NO. [illegible]

CITIZENS FIDELITY BANK AND TRUST COMPANY 91-10/800

PAY TO THE ORDER OF General Land Office $1158"

One Thousand one hundred fifty eight and 11/100 ——— DOLLARS

FOR Remittance of Sec. 24, Blk 70 T1, T+P RRS. Hardeman Co Tx
Interest

Greenberry Simmons

PLAINTIFF'S EXHIBIT
NO. 32 G
ORIGINAL IN
COURT SAFE

LOUISVILLE, KY., 7-16 19 52 NO.

CITIZENS FIDELITY BANK AND TRUST COMPANY 21-10/800

PAY TO THE ORDER OF General Land Office $1158.11

One Thousand one hundred fifty eight and 11/100 ——— DOLLARS

FOR Remittance of Int. Dec. 24, 1951 70 T1, T+PRRS. Hedgpeth & Ux

Greenberry Simmons

PLAINTIFF'S EXHIBIT
NO. 32 H

LOUISVILLE, KY., 7-16 19 52 NO.

CITIZENS FIDELITY BANK AND TRUST COMPANY 21-10/800

PAY TO THE ORDER OF General Land Office $ ———

——— DOLLARS

FOR Remittance of Int. Dec 24, 1951 70 T1 T+PRRS. Hedgpeth

Greenberry Simmons

PLAINTIFF'S EXHIBIT No. 33.

September 6, 1952.

Mr. Greenberry Simmons
Pine Cone Inn
Box 175
Cloudcroft, N. M.

Dear Mr. Simmons:

I have your letter of September 3, 1952 in regard to Section 24, Block 70, Township 1, T. & P. Ry. Co. in Hudspeth County, Texas.

In reply to your three questions I wish to inform you as follows:

A. The application to reinstate was made by Mr. Channel and all interest has been paid in advance to November 1, 1952.

B. The grazing lease expires on January 9, 1953 and on that date the sales contract will be reinstated.

C. There is on file in this office a deed from D. G. Heineman to R. J. Channel. The deed is dated April 11, 1940 and was filed in this office on July 11, 1952. This office does not require deeds transferring title from one person to another to be filed in this office. If you are satisfied with your title as recorded in the County Clerk's office of Hudspeth County, you should have no fear or worry. In the event patent is issued, same would be issued in the name of D. G. Heineman, the original purchaser. After patent is issued, all title

inures to the benefit of the legal owners as shown on the County Clerk's records.

Sincerely yours,
DENNIS WALLACE,
Chief Clerk, Acting Commissioner of the General Land Office

CRL:jw
File: 149470

General Land Office, Austin, Texas October 18, 1961.

I, Jerry Sadler, Commissioner of the General Land Office of the State of Texas, do hereby certify that on the reverse side hereof is a true and correct copy of the original of this instrument now on file in this office together with all indorsements thereon and further certify that I am the officer who has the custody of the filed original official records from which these true Certified Cipies were made.

In Testimony Whereof, I, hereunto set my hand and affix the seal of said office the day and date first above written.

JERRY SADLER,
(Jerry Sadler),
Commissioner of the General Land Office.

(Seal)

PLAINTIFF'S EXHIBIT No. 33-A.

General Land Office
State of Texas
Austin 14

Bascom Giles, Commissioner
Dennis Wallace, Chief Clerk

Tel 21196
September 6, 1952

Mr. Greenberry Simmons
Pine Cone Inn
Box 175
Cloudcroft, N. M.

Dear Mr. Simmons:

I have your letter of September 3, 1952 in regard to Section 24, Block 70, Township 1, T. & P. Ry. Co. in Hudspeth County, Texas.

In reply to your three questions, I wish to inform you as follows:

A. The application to reinstate was made by Mr. Channel and all interest has been paid in advance to November 1, 1952.

B. The grazing lease expires on January 9, 1953 and on that date the sales contract will be reinstated.

C. There is on file in this office a deed from D. G. Heineman to R. J. Channel. The deed is dated April 11, 1940 and was filed in this office on July 11, 1952. This office does not require deeds transferring title

from one person to another to be filed in this office. If you are satisfied with your title as recorded in the County Clerk's office of Hudspeth County, you should have no fear or worry. In the event patent is issued, same would be issued in the name of D. G. Heineman, the original purchaser. After patent is issued, all title inures to the benefit of the legal owners as shown on the County Clerk's records.

Sincerely yours,
DENNIS WALLACE,
(Dennis Wallace),
Chief Clerk, Acting Commissioner of the General Land Office.

CRL:jw
File: 149470

Brief for Plaintiff on Plaintiff's Motion for Summary Judgment; Omitted from the Printed Record pursuant to Appellant's Amended Designation as to printing Record heretofore copied at page 1.

* * * * * * * *

DEFENDANT'S FIRST AMENDED ANSWER.

(Title Omitted.)

Comes now Defendant, City of El Paso, and for Answer says:

Motion to Dismiss for Failure to Join an Indispensable Party.

The State of Texas is an indispensable party to this action. The State's interest is such that no final judg-

ment for Plaintiff could be entered herein without injuriously affecting the State's interest. The State of Texas in its patents to Defendant, reserved all minerals underlying the lands in question, including the right to execute oil, gas and mineral leases covering such minerals, and the right to receive all rents, royalties, and bonuses accruing by virtue of such leases. If the Plaintiff should be successful in his suit, the State would no longer be entitled to execute oil, gas and mineral leases covering the minerals underlying the lands in question, and further, the State would only be entitled to one-half of the rents, royalties and bonuses accruing from such leases. Further, Defendant, as record owner of such property, has conveyed a strip of land corssing such property to the State of Texas for road purposes. Thus, the State of Texas is in effect a co-tenant with Defendant and should be made a party to this action.

Wherefore, premises considered, Defendant prays that the State of Texas either be made a party Defendant to this suit, or that this suit be dismissed.

Answering further herein, if need be, the Defendant states:

I.

Defendant admits the allegations contained in Paragraph 1 of Plaintiff's Complaint.

II.

In reply to Paragraph 2 of Plaintiff's Complaint, Defendant states that it is without sufficient informa-

tion or knowledge to form a belief as to the truth of the allegations contained therein, and therefore denies same and demands strict proof thereof.

III.

Defendant denies all the allegations contained in Paragraph 3 of Plaintiff's Complaint.

IV.

In reply to Paragraph 4 of Plaintiff's Complaint, Defendant admits that it claims an estate, or interest, in the land in question, but denies all other allegations contained therein.

V.

Defendant denies that Plaintiff is entitled to any of the relief prayed for in his Complaint.

Answer by Way of New Matter.

VI.

Defendant states that on November 14, 1955, the General Land Commissioner awarded, without condition of settlement, the North Half (N/2) of Survey 240, SF 7219, Nellie D. Mundy Survey, consisting of 328.65 acres of land in El Paso County, Texas, to the Public Service Board, City of El Paso. On January 26, 1956, said land was patented from the State of Texas to the Public Service Board City of El Paso, by Patent No. 492, Volume 25-B, Abstract No. 10,078, with all minerals reserved to the State of Texas.

Defendant further states that on November 14, 1955, the General Land Commissioner awarded, without condition of settlement, Section 235, SF 7230, Laura E. Mundy Survey, consisting of 292 acres of land in El Paso County, Texas, to the Public Service Board, City of El Paso. On January 16, 1956, said section was patented from the State of Texas to the Public Service Board, City of El Paso, by Patent No. 491, Volume 25-B, Abstract No. 10,077, with all minerals reserved to the State of Texas.

Since acquiring the lands described hereinabove Defendant has not conveyed fee title to same.

First Defense.

VII.

Any claim Plaintiff may have had in and to the lands in question is barred by the provisions of Article 5329, Vernon's Annotated Texas Statutes (1925 Compilation).

Second Defense.

VIII.

Defendant has been in open, notorious, continuous, peaceable possession of the lands in question, under title, claiming same against the world for more than three years; consequently, any claim Plaintiff may have had in and to said land is barred by virtue of Article 5507, Vernon's Annotated Texas Statutes (1925 Compilation).

Third Defense.

IX.

Defendant has been in open, notorious, continuous, peaceable possession of the lands in question, under title, claiming same against the world for more than five years; consequently, any claim Plaintiff may have had in and to said lands is barred by virtue of Article 5509, Vernon's Annotated Texas Statutes (1925 Compilation).

Fourth Defense.

X.

The lands in controversy were forfeited to the State of Texas on July 21, 1947, for non-p ment of interest. There have been no adverse claims or suits filed contesting title to such lands since the date of such forfeiture, until the date Plaintiff filed his suit. During the interim fifteen-year period, intervening rights have attached to the lands in question; therefore, Plaintiff should be estopped from asserting any claim to said lands by virtue of the Doctrine of Laches.

Fifth Defense.

XI.

On or about June 15, 1956, Defendant, in good faith, for valuable consideration and without notice of Plaintiff's claim, purchased the lands in question. Since Defendant was and is a bona fide purchaser of such

lands, the equitable claim or interest of Plaintiff, if any, in such lands terminated as to Defendant.

Wherefore, premises considered, Defendant prays that Plaintiff's claim for relief be denied, that Defendant be allowed to go hence without day and with its costs.

Respectfully submitted,
HARDIE, GRAMBLING, SIMS & GALATZAN,
By WM. J. MOUNCE,
(William J. Mounce).

Filed Mar. 16, 1962.

Memorandum in Support of Defendant's Motion for Summary Judgment;

Plaintiff's Supplemental Brief in Reply to Defendant's Brief on Motion for Summary Judgment;

Omitted from the Printed Record pursuant to Designation as to printing Record copied at page 1.

• • • • • • • •

AFFIDAVIT.

(Title Omitted.)

Before me, the undersigned authority, on this day personally appeared Harold S. Long, known by me to

be a creditable person, who, having been duly sworn, upon oath deposes and says:

I am one of the attorneys for the Plaintiff above named; that Defendant and Plaintiff over 2-1/2 months ago both filed motions for Summary Judgments; that after both had filed briefs, Defendant filed its "First Amended Answer" in such answer and attached thereto a "Motion to Dismiss for Failure to Join an Indispensable Party."

The Plaintiff, alleges, in paragraph 2 of his complaint, that, involved was "the question of title to real estate located within this District" and that he was relying on Title 28 of the United States Code, Section 1655. (This Act was passed by Congress to handle cases where the Court has the res within his district and jurisdiction, and all parties having an interest are not before the Court. A mere interested party is not necessarily an indispensable party.) Affiant believes that the Court can enter an order with reference to this res (real estate) as to the interest claimed by the Plaintiff and the Defendant only, without affecting any other party's rights. Namely, to impress a trust on whatever interest this Defendant has in this res and order possession of the same to Plaintiff without prejudice to any other party's rights. However, if the Court is of the opinion that he cannot so do and that other parties are indispensable, the Plaintiff should have sufficient time to take such action by way of an amended complaint, or by making new parties that may be necessary to protect his interest and opportunity, so far as this suit is concerned, of disclaiming any right the Plaintiff has against the State

of Texas to the road right-of-way easement previously conveyed by the Defendant to the State. Such opportunity may prevent fatal error.

HAROLD S. LONG,
(Harold S. Long).

Subscribed and Sworn to on this, the 27th day of March, 1962, by the said Harold S. Long.

HELEN M. SALIGER,
(Seal) Notary Public, in and for El Paso County, Texas.

My commission expires: June 1, 1963.

MOTION AND PETITION OF PLAINTIFF FOR REHEARING.

(Title Omitted.)

Now comes the Plaintiff, above named and moves and petitions this Honorable Court, for a rehearing, under Rule 59 (a) (1) F.R. Civ. P., to set aside the order and Summary Judgment and granting the Defendant's motion for Summary Judgment, as stated by letter May 2, 1962, of his holdings and findings, and moves the Court to sustain Plaintiff's motion for Summary Judgment and also order for same, herewith attached, for the following reasons:

1. The Court erred in sustaining Defendant's motion for Summary Judgment.

2. The Court erred in failing to recognize that Plaintiff, as a matter of law, reinstated his forfeited lands in July 1952.

3. The Court erred in failing to recognize the source of Plaintiff's title, the settlers-vendee contracts with the State for the purchase of the lands in 1910, (Plaintiff's Exhibits No. 1 and No. 16) which were in process of execution for over 30 years before the Amendments of 1941 and 1951 and settled on by settlers for years and paid interest on same for over 30 years.

4. The Court erred in failing to recognize and apply the following principle: Settlers contracts and awards for public lands by the State, as part of their homesites, which were in the process of execution and interest paid on them for over 30 years, were too far executed, to permit subsequent legislation, giving State these valuable lands by adding additional limitations not in the statute, which was part of the Contracts and Awards at the time they were made in 1910.

5. The Court erred in failing to recognize the purpose and intent of the early Act of 1897, in getting the early settlers to settle upon the large amount of public lands owned by the State of Texas and the hardships they endured to live on these dry lands for three years in order to get them and during those hard years it was not intended that some forty-four years later that the First Party, the State, should add by amendment additional limitations, to their contractural rights. It is hard to imagine, what the ruling in this case will mean to all those settlers, their heirs and

vendees, who have the many purchase contracts still unmatured. Time and again the history and legislative intent of this Act has been made clear by the Texas Courts. A clear illustration is shown by the Supreme Court of Texas eleven years before the 1941 Amendment, in Freels v. Walker, 26 S.W. 2d 627, 628-629.

6. The Land Commissioner has general discretionary powers over the handling of public lands for the State, however, for over a half century, it has been well settled by the Texas Courts that he has no such discretion whatsoever after the settler-vendee has requested that his forfeited lands be reinstated under these purchase contracts.

7. The Land Commissioner, by his letter of July 24, 1952, attempted, without legal processes, to confiscate Plaintiff's lands and the Court erred in recognizing the incorrect status of the land titles at that date, July 24, 1952, in permitting him to do so.

8. The findings and holdings of the Court are contrary to the well settled Texas cases, for over half a century, construing the Act of 1897 (Article 5326) relating to the reinstatement of forfeited public land contracts.

9. For over a half century it has been settled by the Texas Courts in construing Article 5326 from the date of its passage in 1897 to date, that the State alone, without representing a third party rights, cannot deny a settler-vendee the right to reinstate his forfeited lands, where there are no third party rights present and the State had not sold such lands prior to Plaintiff's request to reinstate such lands.

10. If the State had no "such right" to act alone in denying Plaintiff's reinstatement of his forfeited lands, before the Amendments of 1941 and 1951, which added "Such right must be exercised within five (5) years from the date of the forfeiture"; and was given "such right" to act alone without representing present third party rights by this one sentence, then these amendments gave the State more than remedial rights, and these subsequent amendments are unconstitutional in violation of Article 1, Section 10, impairing the prior obligations of these contracts. (Settler-vendee purchase contracts and awards of 1910, Plaintiff's Exhibits No. 1 and No. 16. The only rights Plaintiff obtained by his recorded deeds were obtained under these purchase contracts and awards.)

11. Defendant was a subsequent purchaser of these lands involved, with notice of Plaintiff's prior constructive possession.

12. The Court erred in recognizing the validity of Defendant's subsequent patents issued, in violation of the Texas Constitution, Article 14, Section 2, by refusing to recognize Plaintiff's chain of title covered by all of the official records herein (Plaintiff's Exhibits Nos. 1-33), including all the prior recorded deeds in the "County Records" and all the "evidence of the appropriation of which is * * * in the General Land Office," official records in both offices running back for over 40 years before Defendant's Patents were issued; such constitutional provisions provide as follows:

"All genuine land certificates heretofore or hereafter issued shall be * * * patented only upon vacant

and unappropriated public domain, and not upon land titled or equitably owned under the color of title from the sovereignty of the state, evidence of the appropriation of which is on the County Records or in the General Land Office." Texas Const. Art. 14, Sec. 2.

13. The Court erred in refusing to return the peaceful possession of Plaintiff's lands unto the Plaintiff.

14. The Court erred in not following the principles stated by the Fifth Circuit, in Southern Pine Lumber Co. v. Consolidated Louisiana Lumber Co., 217 F. 719, 723-725; Drumwright, et al. v. Texas Sugarland Co, et al., 16 F. 2d 657, 658, Cert. denied, 274 U.S. 749.

15. The Court erred in failing to apply the following principle: The Amended Acts of the Texas Legislature in 1941 and 1951 (Vernon's, Tex. Civ. Statutes, Annotated, 1925, Art. 5326) providing that such right must be exercised within five (5) years, while the previous Act of 1897 had no such provision, is unconstitutional as to the settlers Glenn and Kilpatrick's contracts and awards made with the State in 1910 and as admitted by the Defendant as not maturing until July 20, 1952, and is still in existence as reinstated then; the previous existing Statute of 1897, which prescribed no time limit but prescribed other limitations, being applicable to such previous made contracts and awards in 1910.

16. The Court erred in ignoring the principle applied by the Texas Courts for over half a century that this reinstatement of forfeited land statute was passed to assist the settler-vendee and not the State, and is thus to be liberally construed in favor of the settler-

vendee instead of the State. Cruzan v. Walker, 26 S.W. 2d 908, 909; Anderson, et al. v. Neighbors, 59, S.W. 543, 545, (1900); Gulf Production Company v. State, 231 S.W. 124, 131-132, 135; Davis v. Yates, 133 S.W. 281, 284-286; Freels v. Walker, 26 S.W. 2d 627, 630.

17. The Court erred in refusing the injunction required by the Plaintiff's prayer, in his complaint, in joining the Defendant from interferring with Plainiff's peaceful prior possession of his lands.

Wherefore the Plaintiff prays that a new hearing may be granted and that the Defendant's Motion for Summary Judgment be denied, and that Plaintiff's Motion for Summary Judgment be granted and that the attached order granting Plaintiff's Summary Judgment be entered.

Respectfully submitted,
HAROLD S. LONG,
(Harold S. Long),
GREENBERRY SIMMONS,
(Greenberry Simmons),
Attorneys for Plaintiff.

I, Harold S. Long, certify that I have delivered a copy of this Motion, attached order and excerpts from the contracts involved, to Mr. William J. Mounce, Attorney for Defendant, this 18th day of May, 1962.

HAROLD S. LONG,
(Harold S. Long).

Pertinent Excerpts Involved, Showing that Chapter 129, Act of May 19, 1897, is Part of these Two Contracts with the State. The Application, Obligation, and Award of 1910 are all in one Contract

for each Settler Glenn and Kilpatrick, Predecessors of this Plaintiff, and the only Rights Granted to him in his Recorded Deeds.

"Application for Land as Additional to Home Tract Applied For."

"To J. T. Robinson, Commissioner General Land Office:

"I hereby[1] APPLY TO PURCHASE UNDER THE PROVISION OF * * * CHAPTER 129, ACT OF MAY 19, 1897, * * * the following land situated in El Paso County, Texas * * * Survey 240 * * * Nellie D. Mundy, Grantee * * * I will in good faith become in person an actual bona fide settler on my home tract or on some portion of the land I purchase within 90 days from the date my application for my home tract is accepted * * *."

"(Signed) W. H. Glenn," Applicant sworn to and subscribed before me, this 25 day of January, 1910 * * *."

"Obligation."

"* * * For value received, I, the undersigned, do promise to pay to the State of Texas the sum of nine hundred thirty six and 00/100 Dollars with interest thereon as hereinafter specified, the same being for the balance of purchase money for the following described tract of land[2], PURCHASED BY ME THIS DAY OF THE STATE OF TEXAS, IN ACCORDANCE

Notes 1, 2. Emphasis added.

WITH THE PROVISIONS OF * * * AND CHAPTER 129, ACTS OF MAY 19, 1897 * * * to-wit: Survey No. 240 * * * Grantee Nellie D. Mundy in El Paso County, Texas."

"The annual interest of three per cent upon all unpaid principal, * * *. And[3] IT IS EXPRESSLY UNDERSTOOD THAT I AM TO COMPLY STRICTLY WITH ALL THE CONDITIONS, LIMITATIONS AND REQUIREMENTS, AND AM SUBJECT TO AND ACCEPT ALL THE PENALTIES CONTAINED IN THE ABOVE RECITED ACTS." * * *

(Signed) "W. H. GLENN"

* * * * * * * *

(On back of the contract) "Awarded Apr. 30, 1910.

(Signed) "J. T. ROBINSON,
"Commissioner General Land Office."

Above is quoted from Plaintiff's Exhibit No. 1. It is the same for Plaintiff's Exhibit No. 16, signed by John B. Kilpatrick for Survey 235, Laura E. Mundy, Grantee. Both of these Plaintiffs' Exhibits are certified copies from the General Land Office files and have been admitted as genuine by the Defendant.

The applications say: "I hereby apply to purchase under the provisions of * * * Chapter 129, Act of May 19, 1897 * * *"

Note 3, Emphasis added.

The "Obligations" Contracts say: "* * * purchased by me this day of the State of Texas, in accordance with the provisions of * * * Chapter 129, Acts of May 19, 1897 * * *".

(Signed) "W. H. GLENN".

* * * * * * * * * *

(On back of the contract) "Awarded Apr. 30, 1910"
(Signed) "J. T. ROBINSON,"
"Commissioner, General
Land Office".

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

In the United States District Court, for the Western District of Texas, El Paso Division.

Greenberry Simmons, Plaintiff,
vs. Civil No. 2334.
City of El Paso, Defendant.

The above entitled cause came before the Court on both Defendant's and Plaintiff's Motions for Summary Judgments.

Messrs. Harold S. Long and Greenberry Simmons, of El Paso, Texas, and Louisville, Ky., appeared in behalf of the Plaintiff; and Mr. William J. Mounce, of El Paso, Texas, appeared in behalf of the Defendant.

The facts necessary to determine this motion appear to be the following:

The Plaintiff reinstated his forfeited lands, herein involved, in July, 1952, and has title to such lands, upon payment of back interest previously tendered and any other interest due and principal, according to his predecessors' contracts of 1910.

Plaintiff is granted the relief prayed for in his Complaint, and Defendant is enjoined from interferring with the peaceful possession of the Plaintiff, to his lands.

The Defendant's Motion for Summary Judgment is denied.

On the Complaint, Answer, Request for Admissions and Affidavits it is established that there is no genuine issue as to any material facts, that the Defendant has no claim and that the Plaintiff is entitled to judgment as a matter of law.

Therefore, it is ordered that judgment be entered in favor of the Plaintiff with cost to be taxed.

Dated .... day of ..... 1962.

By the Court:

....,

Judge.

Filed May 18, 1962.

SUMMARY JUDGMENT.

In the United States District Court for the Western District of Texas, El Paso Division.

Greenberry Simmons, Plaintiff,
vs. No. 2334 Civil.
City of El Paso, Defendant.

Be It Remembered That on March 28, 1962 came on to be heard and considered Defendant's motion for summary judgment and Plaintiff's counter motion for summary judgment; and the parties appearing through their respective counsel, and the Court having read the pleadings, the affidavits and admissions filed herein, heard the argument of counsel and carefully considered the briefs, concludes that the material facts in this case are undisputed, and that Defendant's motion for summary judgment should be granted, and Plaintiff's counter motion for summary judgment should be denied.

It is, Therefore, Orderee, Adjudged and Decreed that Plaintiff's counter motion for summary judgment should be, and the same is hereby denied.

It is Further Ordered, Adjudged and Decreed that be, and the same is hereby granted, and that Plaintiff have and recover nothing by his action, and that Defendant go hence without day and with its costs. All costs shall be taxed against Plaintiff.

Plaintiff excepts to all of the foregoing.

Signed and Entered this 18th day of May, 1962.

R. E. THOMASON,
Judge.

Approved as to Form:

HAROLD S. LONG,
Attorney for Plaintiff,
WM. J. MOUNCE,
(William J. Mounce),
Attorney for Defendant.

Filed May 18, 1962.

ORDER.

(Title Omitted.)

Be It Remembered, that on this, the 21 day of May, A.D., 1962, came on to be heard and considered the Plaintiff's Motion and Petition for Rehearing, and the Court, having considered the Motion, is of the opinion that the original Order granting the Defendant's Motion for Summary Judgment and denying that of the Plaintiff, is a correct disposition of the case and that the Motion for Rehearing should be denied.

It is, Therefore, Ordered, Adjudged and Decreed, that the Motion and Petition of Plaintiff for Rehearing be, and the same is, hereby denied in all things.

To which action on the part of the Court, Plaintiff then and there excepted and gave notice of appeal; which is hereby granted, and all of the records, including all of the original papers, exhibits and affi-

davits are Ordered sent to the Clerk of the Court of Appeals for the Fifth Circuit.

Signed and Entered on the Day and Year above Written.

R. E. THOMASON,
Judge.
WM. J. MOUNCE,
Atty. for Defendant.

Approved as to Form:

HAROLD S. LONG,
Atty. for Plaintiff.

Filed May 21, 1962.

BOND.

(Title Omitted.)

Greenberry Simmons, Appellant herein, and Fidelity and Deposit Company of Maryland, a corporation of the State of Maryland, with its home office in the City of Baltimore, appearing and submitting to the jurisdiction of the Court, hereby undertakes, for themselves, and each of them, their, and each of their, heirs, executors, administrators, successors and assigns, to make good all taxable costs and charges, not exceeding the sum of Two Hundred Fifty Dollars ($250.00), that the Appellees may be put to or allowed if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified.

The said Surety hereby irrevocably appoints the Clerk of this Court as its Agent, upon whom any papers affecting its liability on this undertaking may be served.

Signed, Sealed and Delivered, this 22nd day of May, A.D., 1962.

GREENBERRY SIMMONS,
(Greenberry Simmons),
Principal,
FIDELITY AND DEPOSIT
COMPANY OF MARYLAND;
By JOHN G. LANDER,
(Seal) Authorized Agent, Surety.

Filed May 22, 1962.

Power of Attorney

FIDELITY AND DEPOSIT COMPANY OF MARYLAND

HOME OFFICE: BALTIMORE, MD.

KNOW ALL MEN BY THESE PRESENTS: That the FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation of the State of Maryland, by WM. H. C. GRIFFITH, Vice-President, and J. J. MOORE, Assistant Secretary, in pursuance of authority granted by Article VI, Section 2, of the By-Laws of said Company, which reads as follows:

"The President, or First Vice-President, or Second Vice-President, or any one of the additional Vice-Presidents specially authorized so to do by the Board of Directors or by the Executive Committee, shall have power, by and with the concurrence of the Secretary or any one of the Assistant Secretaries, to appoint Resident Vice-Presidents, Resident Assistant Secretaries, and Attorneys-in-Fact as the business of the Company may require, or to authorize any person or persons to execute on behalf of the Company any bonds, undertakings, recognizances, stipulations, policies, contracts, agreements, deeds, and releases and assignments of judgments, decrees, mortgages and instruments in the nature of mortgages, and also all other instruments and documents which the business of the Company may require, and to affix the seal of the Company thereto."

does hereby nominate, constitute and appoint JOHN G. PONDER, OF EL PASO, TEXAS.....

its true and lawful agent and Attorney-in-Fact, to make, execute, seal and deliver, for, and on its behalf as surety, and as its act and deed:

I. Bonds and undertakings for faithful performance of duty to be filed in any Court of any State of the United States, or in any United States Court, each in a penalty not to exceed the sum of SEVENTY-FIVE THOUSAND DOLLARS ($75,000) as follows: For administrators and executors; for commissioners, referees and trustees for the sale of property; for receivers and trustees in bankruptcy proceedings; for receivers in equity; for persons and corporations exercising powers of sale in deeds, mortgages, and other written instruments covering property located in any State of the United States, EXCEPT ASSIGNMENTS FOR BENEFIT OF CREDITORS.

II. Bonds and undertakings to be filed in any Court as aforesaid, each in a penalty not to exceed the sum of TWENTY-FIVE HUNDRED DOLLARS ($2,500) as follows: For the payment of costs; for petitioning creditors; for plaintiffs in attachment, garnishment, sequestration and replevin suits; for removal of suits from State to Federal Courts.

III. Bonds and undertakings for Trustees under Will, Conservators, Committees for Incompetent Persons and Guardians for faithful performance of duty, and to be filed in any Court as aforesaid, each in a penalty not to exceed the sum of TWENTY-FIVE THOUSAND DOLLARS ($25,000).

IV. Bonds each in a penalty not to exceed the sum of TEN THOUSAND DOLLARS ($10,000) required of State, County, Township or Municipal Officials, of any State of the United States, whether elected or appointed, except those for Treasurers, Deputy Treasurers, Tax Collectors, Deputy Tax Collectors, Sheriffs, Deputy Sheriffs, Police Constables and Justices of Peace.

V. Bonds for Notaries Public required by the Laws of any State of the United States, each in a penalty not to exceed the sum of FIVE THOUSAND DOLLARS ($5,000).

VI. License bonds, each in a penalty not to exceed the sum of FIVE THOUSAND DOLLARS ($5,000) required by the Statute of any State of the United States or by Ordinance of any Municipality in any State.

THIS POWER OF ATTORNEY DOES NOT INCLUDE BONDS ON BEHALF OF INDEPENDENT EXECUTORS AND BONDS ON BEHALF OF COMMUNITY SURVIVORS.....

And the execution of such bonds or undertakings in pursuance of these presents, shall be as binding upon said Company, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the Company at its office in Baltimore, Maryland, in their own proper persons.

The said Assistant Secretary does hereby certify that the aforegoing is a true copy of Article VI Section 2, of the By-Laws of said Company, and is now in force.

IN WITNESS WHEREOF, the said Vice-President and Assistant Secretary have hereunto subscribed their names and affixed the Corporate Seal of the said FIDELITY AND DEPOSIT COMPANY OF MARYLAND, this 18TH day of AUGUST, A.D. 19 53

ATTEST:

FIDELITY AND DEPOSIT COMPANY OF MARYLAND

(SIGNED) J. J. MOORE
(SEAL) *Assistant Secretary*

By WM. H. C. GRIFFITH
Vice-President

STATE OF MARYLAND
CITY OF BALTIMORE ss:

On this 18TH day of AUGUST, A.D. 19 53, before the subscriber, a Notary Public of the State of Maryland, in and for the City of Baltimore, duly commissioned and qualified, came the above-named Vice-President and Assistant Secretary of the FIDELITY AND DEPOSIT COMPANY OF MARYLAND, to me personally known to be the individuals and officers described in and who executed the preceding instrument, and they each acknowledged the execution of the same, and being by me duly sworn, severally and each for himself deposeth and saith, that they are the said officers of the Company aforesaid, and that the seal affixed to the preceding instrument is the Corporate Seal of said Company, and that the said Corporate Seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said Corporation.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my Official Seal, at the City of Baltimore, the day and year first above written.

(SIGNED) DOLORES DEMMA
(SEAL) *Notary Public*

CERTIFICATE I, A. R. FROMM, Assistant Secretary of the FIDELITY AND DEPOSIT COMPANY OF MY COMMISSION EXPIRES MAY 2, 1955

III. Bonds and undertakings for Trustees under Will, Conservators, Committees for Incompetent Persons and Guardians for faithful performance of duty, and to be filed in any Court as aforesaid, each in a penalty not to exceed the sum of TWENTY-FIVE THOUSAND DOLLARS ($25,000).

IV. Bonds each in a penalty not to exceed the sum of TEN THOUSAND DOLLARS ($10,000) required of State, County, Township or Municipal Officials, of any State of the United States, whether elected or appointed, except those for Treasurers, Deputy Treasurers, Tax Collectors, Deputy Tax Collectors, Sheriffs, Deputy Sheriffs, Police Constables and Justices of Peace.

V. Bonds for Notaries Public required by the Laws of any State of the United States, each in a penalty not to exceed the sum of FIVE THOUSAND DOLLARS ($5,000).

VI. License bonds, each in a penalty not to exceed the sum of FIVE THOUSAND DOLLARS ($5,000) required by the Statute of any State of the United States or by Ordinance of any Municipality in any State.

THIS POWER OF ATTORNEY DOES NOT INCLUDE BONDS ON BEHALF OF INDEPENDENT EXECUTORS AND BONDS ON BEHALF OF COMMUNITY SURVIVORS.

And the execution of such bonds or undertakings in pursuance of these presents, shall be as binding upon said Company, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the Company at its office in Baltimore, Maryland, in their own proper persons.

The said Assistant Secretary does hereby certify that the aforegoing is a true copy of Article VI, Section 2, of the By-Laws of said Company, and is now in force.

IN WITNESS WHEREOF, the said Vice-President and Assistant Secretary have hereunto subscribed their names and affixed the Corporate Seal of the said FIDELITY AND DEPOSIT COMPANY OF MARYLAND, this 18TH day of AUGUST, A.D. 19 53

ATTEST: **FIDELITY AND DEPOSIT COMPANY OF MARYLAND**

(SIGNED) J. J. MOORE — *Assistant Secretary*
(SEAL)

By W. H. C. GRIFFITH — *Vice-President*

STATE OF MARYLAND
CITY OF BALTIMORE } ss:

On this 18TH day of AUGUST, A.D. 19 53, before the subscriber, a Notary Public of the State of Maryland, in and for the City of Baltimore, duly commissioned and qualified, came the above-named Vice-President and Assistant Secretary of the FIDELITY AND DEPOSIT COMPANY OF MARYLAND, to me personally known to be the individuals and officers described in and who executed the preceding instrument, and they each acknowledged the execution of the same, and being by me duly sworn, severally and each for himself deposeth and saith, that they are the said officers of the Company aforesaid, and that the seal affixed to the preceding instrument is the Corporate Seal of said Company, and that the said Corporate Seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said Corporation.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my Official Seal, at the City of Baltimore, the day and year first above written.

(SIGNED) DOLORES DEMMA
(SEAL) *Notary Public*

MY COMMISSION EXPIRES MAY 2, 1955

CERTIFICATE

I, A. R. FROMM, Assistant Secretary of the FIDELITY AND DEPOSIT COMPANY OF MARYLAND, do hereby certify that the attached Power of Attorney dated AUGUST 18TH, 19 53, in behalf of JOHN G. PONDER of EL PASO, TEXAS is a true and correct copy and that same has been in full force and effect since the date thereof and is in full force and effect on the date of this certificate; and I do further certify that the said W. H. C. GRIFFITH and J. J. MOORE, who executed the attached Power of Attorney as Vice-President and Assistant Secretary respectively, were on the date of the execution of the attached Power of Attorney the duly elected Vice-President and Assistant Secretary of the FIDELITY AND DEPOSIT COMPANY OF MARYLAND, and that the said W. H. C. GRIFFITH was one of the additional Vice-Presidents specially authorized by the Board of Directors to appoint any Attorney-in-Fact or to authorize any person or persons to execute on behalf of the Company any bonds, recognizances, stipulations, undertakings, deeds, releases of mortgages, contracts, agreements and policies, and to affix the seal of the Company thereto as provided in said Article VI, Section 2 of the By-Laws of the FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the corporate seal of the said Company, this TWENTY-SECOND day of MAY, 19 62

L1427 Ctf.

A. R. Fromm
Assistant Secretary

5-F 124

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Received May 24, 1962.

Filed Jun. 20, 1962.

In the United States District Court, for the Western District of Texas, El Paso Division.

Greenberry Simmons, Plaintiff,
vs. No. 2334 Civil.
City of El Paso, Defendant.

Notice is hereby given that Greenberry Simmons, Plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Fifth Circuit from the order of May 18, 1962 granting the Defendant, City of El Paso, motion for Summary Judgment and denying the Plaintiff's motion for Summary Judgment; and from the order of May 21, 1962 denying the Plaintiff's motion and petition for a re-hearing of the final Judgment of May 18, 1962. This appeal is taken from the United States District Court for the Western District of Texas, El Paso Division.

HAROLD S. LONG,
(Harold S. Long),
Caples Bldg.,
El Paso, Texas.

GREENBERRY SIMMONS,
(Greenberry Simmons).
Ky. Home Life Bldg.,
Louisville 2, Ky.

Filed May 22, 1962.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

Filed Jun. 20, 1962.

(Title Omitted.)

Appeal from the United States District Court for the Western District of Texas, El Paso Division, Civil Action No. 2334.

Come Greenberry Simmons, Appellant-Plaintiff, by his attorneys, and for the purpose of designation of the contents of the record on this appeal, requests the Clerk of the Court of Appeals to have printed all of the records filed in the District Court, by both Plaintiff and Defendant, including all of the Plaintiff's exhibits and affidavits.

The docket in District Court is as follows:

8-31-61—(1) Filed complaint in duplicate.

8-31-61—Issued summons and copy.

9-6-61—(2) Filed Return Summons exe. 9-1-61.

9-22-6—(3) Answer of City of El Paso in dup.

10-5-61—(4) Plaintiff's Request for Admissions by Defendant.

11-16-62—(5) Filed Response to Request for Admission in dup.

12-22-61—(6) Filed Defendant's Motion for Summary Judgment, in dup.

12-27-61—(7) Filed Plaintiff's Motion for Summary Judgment.

12-27-61—(8) Filed Plaintiff's Exhibits 32A-32G (in the vault).

1-15-62—(9) Filed Brief for Plaintiff on Plaintiff's Motion for Summary Judgment, in dup.

1-15-62—(10) Filed Certificate showing 2 copies of above brief mailed to Morris A. Galatzan, Attorney for Defendant.

3-16-62—(11) Filed Defendant's first amended answer, in dup.

3-16-62—(12) Filed memorandum in support of Defendant's Motion for Summary Judgment.

3-27-62—(13) Filed Plaintiff's Supplemental Brief in reply to Defendant's Brief on Motion for Summary Judgment, in dup.

3-27-62—(14) Filed Affidavit, in dup.

5-18-62—(15) Motion and Petition of Plaintiff for rehearing, in dup.

5-18-62—(16) Filed Summary Judgment for Defendant, City of El Paso.

5-21-62—Notices Mailed to counsel.

5-21-62—(17) Filed Order denying Motion and Petition of Plaintiff for re-hearing.

5-22-62—Notices of above order mailed to counsel.

5-22-62—(18) Filed appeal bond for the sum of $250.00.

5-22-62—(19) Filed Notice of Appeal, in dup.

HAROLD S. LONG,
(Harold S. Long),
Caples Bldg.,
El Paso, Texas.

GREENBERRY SIMMONS,
(Greenberry Simmons),
Attorneys for Appellant.
Kentucky Home Life Bldg.,
Louisville 2, Ky.

CLERK'S CERTIFICATE.

United States of America,
Western District of Texas.

I, MAXEY HART, Clerk of the United States District Court in and for the Western District of Texas, do hereby certify that the foregoing papers as shown in the index are the original papers filed in cause No. 2334 Civil Action, styled: Greenberry Simmons versus City of El Paso and directed to be sent up in the original as the same have been filed and recorded in this office.

Witness my official signature and the seal of said District Court, at office in the City of El Paso, Texas, this the 13th day of June, 1962.

MAXEY HART,
Clerk of said Court,
By PAULINE G. SILVEUS,
(Pauline G. Silveus),
Deputy.

(Seal)

[fol. 153] MINUTE ENTRY OF ARGUMENT AND SUBMISSION—November 28, 1962 (omitted in printing).

[fol. 154]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19754

GREENBERRY SIMMONS, Appellant,

versus

CITY OF EL PASO, Appellee.

Appeal from the United States District Court for the Western District of Texas.

OPINION—July 18, 1963

Before Rives, Jones and Brown, Circuit Judges.

JONES, Circuit Judge: Federal jurisdiction in this action was asserted on diversity of citizenship and under 28 U.S.C.A. § 1655. It is difficult to see how Section 1655 has anything to do with jurisdiction in this case but since diversity of citizenship and the jurisdictional amount of a [fol. 155] matter in controversy are present, the question need not be considered.

Predecessors of title of the appellant, Greenberry Simmons, on January 25, 1910, made written applications to purchase land in El Paso County, Texas, from the State of Texas, reciting in the applications that they were made "under the provisions of Chapter 47, Act of 1895, Chapter 129, Act of May 19, 1897, and other Texas statutes." The obligations of the applicants, who became purchasers of the lands, required the annual payment of one-fortieth of the principal and interest at three per cent. The obligations, accepted by the Texas Land Commissioner, recited the purchase of the described land "in accordance with the provisions of," the foregoing statutes of Texas.

The 1897 statute to which reference was made in the title instruments contained a provision that,

> "In any cases where lands have been forfeited to the State for the non-payment of interest, the purchasers or their vendees may have their claims reinstated on their written request, by paying into the treasury the full amount of interest due on such claim up to the date of reinstatement; provided, that no rights of third persons may have intervened. In all such cases the original obligations and penalties shall thereby become as binding as if no forfeiture had ever occurred." Texas Act, 1897, Ch. 197.

[fol. 156] In 1941, the Texas Legislature reaffirmed the right to reinstate a contract of purchase after a forfeiture but imposed a five-year limitation period upon the exercise of the right with respect to forfeitures thereafter occurring. In the act it was provided:

> "In any case where lands may hereafter be forfeited to the State for non-payment of interest, the purchasers, or their vendees, heirs, or legal representatives, may have their claims reinstated on their written request, by paying into the Treasury the full amount of interest due on such claim up to the date of reinstatement, provided that no rights of third persons may have intervened. The right to reinstate shall be limited to the last purchaser from the State or his vendees or their heirs or legal representatives. Such right must be exercised within five (5) years from the date of the forfeiture, and the right to reinstate any claim heretofore forfeited by the Commissioner must be exercised within five (5) years from the effective date of this Act, but not thereafter." Texas Acts 1941, Ch. 191.

In 1951 this statute was amended but not, apparently, in any particular which is here pertinent. Texas Acts 1951, Ch. 59.

On July 21, 1947, the land was forfeited to the State for non-payment of interest. On July 23, 1952, the Land Commissioner of the State of Texas received from the appellant, who was the mesne grantee of the original purchasers, [fol. 157] applications to reinstate the claims to the lands, with checks for the unpaid interest. On July 24, 1952, the

Land Commissioner returned the applications and checks to the appellant with a letter in which it was said:

> "With reference to the reinstatement of forfeited accounts as set out under the provisions of Article 5326, Revised Civil Statutes, in order to reinstate a forfeited account, the forfeiting owner, his heirs or assigns, must exercise such right within five years from the date of forfeiture. To exercise such rights the application to reinstate and also payment of all interest and penalty must be received in the five year period.
>
> "In considering this matter, our attorneys have decided to reject the applications to reinstate the above described lands and the applications were not received until July 23. Due to this fact, your applications are being returned together with your two payments received on July 23."

On May 23, 1955, the Texas Legislature authorized the sale to the City of El Paso of fourteen thousand acres of land in El Paso County, including the lands claimed by the appellant. The lands were patented to the appellee City on January 26, 1956. Another statute of the State of Texas, enacted in 1921, contained a provision that "No sale made without condition of settlement shall be questioned by the [fol. 158] State or any person after one year from the date of such sale." Vernon's Ann. Tex. Stat. Art. 5329. The appellant brought an action in the nature of trespass to try title on August 31, 1961. The City asserted by defenses, the limitation of the 1941 and 1951 statutes, the bar of Article 5329, adverse possession, and that intervening rights and lapse of time had resulted in the appellant's claim being barred by laches. Both parties filed motions for summary judgment. The motion of the defendant was granted and judgment was entered that the appellant take nothing. From that judgment this appeal has been taken.

Although other issues are made by the claim asserted in the complaint and the defenses set out in the answer, only two of these require present consideration. First, we must decide whether Article 5329 cut off the right of the appellant to question the validity of the sale to the City of El Paso. If this statute does not bar the appellant, then

we must ascertain whether the statutes of 1941 and 1951 work an impairment of the obligation of the contract of purchase with the result that the tender of the delinquent payments before any intervening rights arose reinstated the contract. As to the first of these questions, it would seem that if the application for reinstatement and tender of the delinquent interest made by the appellant were valid and effective so as to restore the rights which had been forfeited, the sale to the City of El Paso would have been illegally made and void. Statutes relieving from forfeiture are to be liberally construed in favor of the owner. The one-year limitation provisions would not be applicable [fol. 159] if a reinstatement had been effected before the subsequent attempt to sell. *Davis* v. *Yates*, 63 Tex. Civ. App. 6, 133 S. W. 281. See also *Lovett* v. *Simmons*, Tex. Comm. App. 29 S. W. 2d 1021; *Herndon* v. *Robinson*, Tex. Comm. App. 114 Tex. 446, 270 S. W. 159. We are then required to determine the second question.

It is said that "The books disclose numerous disputes which have arisen where land [in Texas], having been awarded to one person, thereafter was forfeited and awarded to another, the claim of the earlier purchaser depending upon the showing as to whether he was entitled to be reinstated to his rights under his contract of purchase." 34 Tex. Jur. 190, Public Lands § 129. The contract between the appellant's predecessor in title and the State was made pursuant to the statute, and the provisions of the statute became terms of the contract. *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, 58 S. Ct. 443, 82 L. Ed. 685, 113 A.L.R. 1482, reh. den. 303 U. S. 667, 58 S. Ct. 641, 82 L. Ed. 1123. See also *Dodge* v. *Board of Education*, 302 U. S. 74, 58 S. Ct. 98, 82 L. Ed. 57; *Hall* v. *Wisconsin*, 103 U. S. 5, 26 L. Ed. 302.

The United States Constitution provides that "No state shall . . . pass . . . any law impairing the obligation of contracts." U. S. Const., Art. I, Sec. 10. A Court of Civil Appeals of Texas has held that this constitutional provision "is violated whenever there is any invasion to the effect of the asserted contract in however small a particular, and it is not required that the contract be entirely [fol. 160] or even materially impinged upon." *Simpson* v.

Pontotoc Common County Line School District, Tex. Civ. App. 275 S. W. 449.

It is the obligation of the contract that is not to be impaired. A statute which merely changes the remedy does not, as a general rule, impair the obligation. *Aikens* v. *Kingsbury*, 247 U. S. 484, 38 S. Ct. 558, 62 L. Ed. 1226. Statutes of limitation refer to the remedy and not to the obligation of a contract and hence do not fall within the constitutional inhibition of statutes impairing the obligation of contracts. *Sturges* v. *Crowinshield*, 4 Wheat. 122, 4 L. Ed. 529. The statutory provision, forming a part of the contract, gave to the contract purchaser a right to reinstate his contract at any time before the rights of third persons intervened. This right of reinstatement was in the nature of a continuing option which the State could terminate only by the creation of a right in another. A Texas Court of Civil Appeals has declared that, "It is our duty to construe these laws so as to alleviate against the rigors of forfeiture, for the law abhors a forfeiture." *State* v. *Walden*, Tex. Civ. App. 325 S.W.2d 705. See also *Gulf Production Co.* v. *State*, Tex. Civ. App. 231 S. W. 124.

In construing the statutory language providing for reinstatement after forfeiture, it was held in the case last cited that the statute was embraced in the contract when it was entered into, and neither the state nor the purchaser could arbitrarily and without the consent of the other write into [fol. 161] the contract any provision or condition varying, restricting or enlarging the terms of the contract; and, the payment of the delinquent interest before the intervention of rights of a third party being the only condition to reinstatement, the state could not impose a different or additional condition. 231 S. W. 124, 131. The right of reinstatement is a vested right which is entitled to protection of constitutional guarantees. See *Anderson* v. *Neighbors*, 94 Tex. 236, 59 S. W. 543. The statute, in force when the purchase was made, which gave to the purchaser a right to redeem from forfeiture, was not one dealing with a remedy, but on the contrary created an obligation of the state to reinstate the contract if payment was made before the intervention of the rights of others. The state could not impair this right, as it attempted to do by the 1941 and 1951

Acts. *Cf. Home Insurance Co.* v. *Dick*, 281 U. S. 397, 50 S. Ct. 338, 74 L. Ed. 926, 74 A.L.R. 701. The tender made by the appellant, assuming it has been or will be kept good, reinstated the contract.

The district court did not consider the defenses of adverse possession and laches. If sustained by the preponderance of evidence one or more of these defenses might defeat the appellant's claim. Therefore a remand is required for the trial of these issues.

Reversed and Remanded.

[fol. 162]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1962

No. 19,754

D. C. Docket No. 2334 Civil

GREENBERRY SIMMONS, Appellant,

versus

CITY OF EL PASO, Appellee.

Appeal from the United States District Court for the Western District of Texas.

Before Rives, Jones and Brown, Circuit Judges.

JUDGMENT—July 18, 1963

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded

to the said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellee, City of El Paso, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

July 18, 1963

Issued as Mandate:

Recoverable Costs:

Docketing Cause, Etc.	$ 25.00
Costs of Printing Record	452.50
Total	$477.50

[fol. 163] [File endorsement omitted]

[fol. 164]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19,754

[Title omitted]

On Appeal from the United States District Court for the Western District of Texas, El Paso Division.

APPELLEE'S PETITION FOR REHEARING—
Filed August 8, 1963

Appellee, City of El Paso, respectfully petitions the Honorable Court of Appeals for a rehearing in the above cause, and in support thereof, states:

POINT NO. ONE

Article 5326 of Vernon's Annotated Texas Statutes merely modified the remedy by which the State of Texas terminates its land purchase agreements. Therefore, the Court erred in adjudging the Statute an unconstitutional impairment of a contract obligation.

[fol. 165] POINT NO. TWO

Appellee was a bona fide purchaser of the lands in question, and as such, cut off any prior equitable claims of Appellant. Therefore, the Honorable Court of Appeals erred in reversing the decision of the Trial Court.

Wherefore, Appellee respectfully petitions the Honorable Court of Appeals to grant a rehearing in the above cause, and affirm the decision of the Trial Court.

Respectfully submitted,

William J. Mounce of Hardie, Grambling, Sims & Galatzan, Third Floor El Paso Natural Gas Company Building, El Paso, Texas, Attorneys for Appellee.

CERTIFICATE

I, William J. Mounce, attorney for the Appellee, City of El Paso, do hereby certify that the above and foregoing Petition for Rehearing is presented in good faith, and not for delay. I further certify that I have mailed a copy of this Petition to the counsel for Appellant.

William J. Mounce

[fol. 166] BRIEF IN SUPPORT OF PETITION FOR REHEARING—Filed August 8, 1963 (omitted in printing).

[fol. 174]

UNITED STATES COURT OF APPEALS,

FIFTH CIRCUIT

OFFICE OF THE CLERK

EDWARD W. WADSWORTH
Clerk

Post Office Box 30120
New Orleans 30, La.

August 29, 1963

Re: No. 19754 — GREENBERRY SIMMONS, v.
CITY OF EL PASO

Gentlemen:

You are hereby advised that the Court has today entered an order denying the Petition for Rehearing in the above case. No opinion was rendered in connection therewith.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

Mr. Harold S. Long
Attorney at Law
El Paso, Texas

Mr. Greenberry Simmons
Attorney at Law
Louisville, Kentucky

Messrs. Morris A. Galatzan & Wm. J. Mounce
Attorneys at Law
El Paso, Texas

[fol. 175] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19754

[Title omitted]

Appeal from the United States District Court for the Western District of Texas.

Before Rives, Jones and Brown, Circuit Judges.

Per Curiam

ORDER DENYING PETITION FOR REHEARING—August 29, 1963

It Is Ordered That the petition for rehearing in the above entitled and numbered cause be, and it is hereby Denied.

[fol. 176]

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

EDWARD W. WADSWORTH
Clerk

Post Office Box 23
New Orleans 6, La.

September 26, 1963

Clerk
United States District Court
El Paso, Texas

Re: No. 19754 — Greenberry Simmons vs.
City of El Paso
(Your No. 2334 Civil)

Dear Sir:

Enclosed is a certified copy of the judgment of this Court in the above case, issued as and for the mandate, together with a copy of its opinion.

Incorporated on the judgment is a detailed statement of the costs in this Court, as follows:

Docketing cause, etc.	$ 25.00
Costs of Printing Record	452.50
Total	$477.50

recoverable by appellant from appellee upon a final settlement of all costs in your Court. Under separate cover, in one package, I am returning to you the record on appeal in this case.

Please acknowledge receipt.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By .....
Chief Deputy Clerk

encs. (Letter Only)
cc: Mr. Harold S. Long
Mr. Greenberry Simmons
Messrs. Morris A. Galatzan and William J. Mounce

[fol. 177] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19,754

[Title omitted]

NOTICE OF APPEAL TO SUPREME COURT OF THE UNITED STATES—Filed November 27, 1963

I.

Notice is hereby given that the City of El Paso hereby appeals to the Supreme Court of the United States from the judgment of the United States Court of Appeals for the Fifth Circuit, entered on or about September 7, 1963. This appeal is taken pursuant to 28 U.S.C.A. § 1254(2).

II.

The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the United States Supreme Court and include in said transmission the following:

1. Plaintiff's Complaint.
2. Defendant's First Amended Original Answer.
3. Plaintiff's Request for Admissions.
4. Defendant's Response to Request for Admissions.
5. Defendant's Motion for Summary Judgment and Supporting Affidavits.
6. Plaintiff's Exhibits 1-33A, inclusive.
7. Summary Judgment entered by the United States District Court for the Western District of Texas, dated May 18, 1962.
8. Decision of the United States Court of Appeals for the Fifth Circuit, dated July 18, 1963.

9. Letter from the Clerk of the United States Court of Appeals, for the Fifth Circuit, dated August 29, 1963, advising of an entry of Order denying Appellee's Petition for Rehearing.

[fol. 178] 10. Letter for the Clerk of the United States Court of Appeals for the Fifth Circuit, dated September 26, 1963, addressed to the Clerk of the United States District Court of El Paso, enclosing a certified copy of the judgment of the United States Court of Appeals for the Fifth Circuit.

11. Notice of Appeal to the United States Supreme Court.

III.

The question presented for appeal is whether the requirement that a forfeited Texas Land Contract be reinstated within five years from the date of forfeiture as provided in Article 5326, Vernon's Annotated Texas Statutes is repugnant to Article 1, Section 10 of the United States Constitution.

HARDIE, GRAMBLING, SIMS & GALATZAN

By WILLIAM J. MOUNCE

Proof of Service (omitted in printing).

[fol. 181] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 182] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19,754

GREENBERRY SIMMONS, Appellant,

vs.

CITY OF EL PASO, Appellee.

ORDER EXTENDING TIME—February 15, 1964

This is an application by the City of El Paso to enlarge the time for docketing the appeal and filing the record with the Clerk of the United States Supreme Court presented to me as a "judge of the court whose decision is being appealed or in which the notice of appeal is filed." Supreme Court Rule 13, par. 1, 28 USCA. The judgment appealed from was entered on September 26, 1963, following the opinion of this Court in Simmons v. City of El Paso, 1963, 320 F.2d 541 [No. 19754, July 18, 1963]. The Notice of Appeal was timely filed on November 27, 1963, Supreme Court Rule 11; 28 USCA §2101(c). Under Supreme Court Rule 13, Appellant-City of El Paso had 60 days from November 27, 1963 to docket the case and file the record with the Clerk of the Supreme Court. The 60th day fell on Sunday, January 26, 1964, and on Monday, January 27, 1964, Appellant filed an application to enlarge the time with the Clerk of the United States Supreme Court, addressed to the Circuit Justice, the Honorable Hugo L. Black. This application [fol. 183] was timely, Supreme Court Rules 13, par. 1; 34, pars. 2 and 1. However, the application was apparently addressed to the wrong member of the Judiciary, Supreme Court Rule 13, par. 1, no application having first been made to a judge of this Court, and the Clerk of the United States Supreme Court, on January 28, 1964, informed Appellant by telephone that application should be addressed to a

Judge of this Court. On that same day, Tuesday, January 28, 1964, Appellant filed, by telegram, the instant application for a 30-day extension. At the time the application was filed, there was doubt that it was timely. At my suggestion the Appellant filed further papers with me which developed the facts just recited. This Court is informed by letter that Appellee Simmons does not object to a 30-day extension provided it does not waive any rights he may have, including damages for delay and right to require Appellant to file a supersedeas bond.

Because filed with the Supreme Court within the 60-day period, the application is timely; good cause has been demonstrated. Since it does not appear that anyone objects or that anyone will be harmed; it is ordered that the time for docketing the case and filing the record be extended 30 days to February 26, 1964.

Done this 15 day of February, 1964, at Houston, Texas.

John R. Brown, United States Circuit Judge.

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 184]

SUPREME COURT OF THE UNITED STATES

No. 866—October Term, 1963

CITY OF EL PASO, Appellant,

vs.

GREENBERRY SIMMONS.

Appeal from the United States Court of Appeals for the Fifth Circuit.

ORDER NOTING PROBABLE JURISDICTION—April 20, 1964

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

Office-Supreme Court, U.S.
FILED
FEB 25 1964
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

No. [redacted] 38
1964

CITY OF EL PASO,

Appellant,

v.

GREENBERRY SIMMONS,

Appellee.

JURISDICTIONAL STATEMENT

for Appeal from the United States Court of Appeals for the Fifth Circuit

THORNTON HARDIE,
WILLIAM J. MOUNCE,
of
HARDIE, GRAMBLING, SIMS & GALATZAN,
Third Floor, El Paso Natural Gas Company Building,
El Paso, Texas,
Attorneys for Appellant.

WARLICK PRESS, INC.—2263 VALDINA STREET—DALLAS—ME 1-3130

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In the

Supreme Court of the United States

No.

CITY OF EL PASO, *Appellant*,

v.

GREENBERRY SIMMONS, *Appellee*.

JURISDICTIONAL STATEMENT

Appellant submits herewith its Jurisdictional Statement and would respectfully show the Court the following:

A. OPINION BELOW

The decision appealed from is reported in Volume 320 Federal Reports 2d Series, Pages 541-545. A copy of said decision appears in the Appendix, Beginning at page A-1.

B. STATEMENT OF JURISDICTION

Suit was instituted by Appellee, Greenberry Simmons, to quiet title to two parcels of land located in El Paso County, Texas. Federal jurisdiction is based on 28 U.S.C.A. §1332. The trial court sustained Appellant's motion for summary judgment; however, the United States Court of Appeals for

the Fifth Circuit, by decision dated July 18, 1963, reversed and remanded the case. Appellant's petition for rehearing was denied by order dated August 29, 1963, and judgment was entered on the decision of the United States Court of Appeals on September 7, 1963. Notice of Appeal was filed in the United States Court of Appeals for the Fifth Circuit on November 27, 1963. Appellant applied for, and by order dated February 15, 1964, was granted a thirty day extension within which to docket its appeal and file a jurisdictional statement. This appeal is taken pursuant to 28 U.S.C.A. §1254 (2). *Cf. City of Chicago v. Atchison, Topeka and Santa Fe Railway Co.*, 357 U.S. 77; 78 S. Ct. 1063 (1958).

C. STATUTES INVOLVED

The decision of the United States Court of Appeals for the Fifth Circuit held that *Article 5326 of Vernon's Annotated Texas Statutes*, quoted below, impaired the obligation of a contract between the State of Texas and Appellee's predecessors contrary to Article I, Section 10 of the United States Constitution.

Article 5326 provides as follows:

> "If any portion of the interest on any sale should not be paid when due, the land shall be subject to forfeiture by the Commissioner entering on the wrapper containing the papers "Land Forfeited," or words of similar import, with the date of such action and sign it officially, and thereupon the land and all payments shall be forfeited to the State, and the lands may be offered for sale on a subsequent sale date. In any case where lands have heretofore been forfeited or may hereafter be forfeited to the State for non-

payment of interest, the purchasers, or their vendees, heirs or legal representatives, may have their claims reinstated on their written request by paying into the Treasury the full amount of interest due on such claim up to the date of re-instatement, provided that no rights of third persons may have intervened. The right to re-instate shall be limited to the last purchaser from the State or his vendees or their heirs or legal representatives. Such right must be exercised within five (5) years from the date of the forfeiture. In case there is an outstanding valid grazing lease which would prevent re-instatement within the time prescribed by this Act, then such claim may be reinstated within sixty (60) days after the expiration of such grazing lease, provided application for reinstatement shall have been filed in the General Land Office within the five-year period above prescribed, accompanied with payment of all interest due thereon. In all cases the original obligations and penalties shall thereby become as binding as if no forfeiture had ever occurred. If any purchaser shall die, his heirs or legal representatives shall have one (1) year in which to make payment after the first day of November next after such death, before the Commissioner shall forfeit the land belonging to such deceased purchaser; and should such forfeiture be made by the Commissioner within said time, upon proper proof of such death being made, such forfeiture shall be set aside, provided that no rights of third persons may have intervened. Nothing in this Article shall inhibit the State from instituting such legal proceedings as may be necessary to enforce such forfeiture, or to recover the full amount of the interest and such penalties as may be due the State at the time such forfeiture occurred, or to protect any other right to such land."

D. QUESTION PRESENTED

The land purchase contracts upon which Appellee's claim is based were forfeited by the State of Texas for non-pay-

ment of interest and were not reinstated within the five-year period required by *Article 5326*. The five-year limitation feature contained in the statute, however, was enacted subsequent to the time the land purchase contracts were entered into. The question therefore presented by this appeal is whether the application of the five-year limitation provision of *Article 5326* to Appellee's land purchase contracts is repugnant to Article I, Section 10 of the United States Constitution.

E. STATEMENT OF THE CASE

Appellee's predecessors entered into purchase agreements with the State of Texas in 1910 (R. 43, 67). The Texas statute in effect in 1910 provided that a forfeited land purchase contract could be reinstated by payment of all back interest, provided that the rights of no third party had intervened. See *Article 4218f*, quoted in the Appendix beginning on page A-8. *Article 4218f*, from which *Article 5326* was derived, was amended in 1941, to provide that the privilege of reinstatement must be exercised within five years from the date of forfeiture. The land purchase contracts in question provide essentially that the purchaser will pay a certain specified sum to the State of Texas and upon payment in full, the State will issue a patent covering the land. On July 21, 1947, the purchase contracts were forfeited for failure to pay interest. Appellee, via quitclaim deeds dated June 10, 1952, acquired the vendees' right, title and interest in and to the lands in question. Apparently Appellee in the latter part of July, 1952, filed an appli-

cation for reinstatement pursuant to *Article 5326*. (R. 120, 121); however, since the application was not filed within the five-year period required by *Article 5326*, it was rejected. Thereafter, the lands in question were, on November 15, 1955, awarded to Appellant pursuant to Senate Bill 295, Acts of the 54th Legislature, Ch. 278, 1955, which Act appears in the Appendix hereof beginning on page A-9. Appellant paid the full purchase price and on January 16, 1956, received patents from the State of Texas. On August 31, 1961, Appellee instituted this action. As stated above, the trial court awarded Appellant summary judgment, but the decision was reversed by the United States Court of Appeals for the Fifth Circuit.

This appeal presents a substantial question in constitutional law. The statute which the United States Court of Appeals struck down has been in effect in the State of Texas since 1941. Consequently, numerous land titles in Texas will become questionable if the decision of the Court of Appeals is permitted to stand. It is common knowledge that the State of Texas no longer sells its lands. Therefore, there is little likelihood that rights of third parties will intervene in forfeited land purchase contract situations as contemplated by *Article 4218f*. The decision of the United States Court of Appeals permits purchasers in situations similar to Appellees to sit back aand pay absolutely nothing on their purchase contracts, pay no ad valorem taxes, and wait until the lands have increased in value through someone else's effort and then decide whether to reinstate their purchases. Since no sales of land are being made, there is

no possibility of intervening rights and the privilege of reinstating thereby becomes perpetual. In all probability this is the exact reason why the limitation feature was inserted in *Article 5326*.

The five-year limitation feature of *Article 5326* is merely a method by which the State of Texas rescinds forfeited land purchase contracts and pertains only to the State's remedy in case of default. This Court has had occasion to determine the obligation imposed in a State of Texas land purchase contract identical to the one under which Appellee is claiming. *Wilson v. Standifer*, 184 U.S. 399 (1902); and *Waggoner v. Flack*, 188 U.S. 595 (1903). The cases referred to are explicit insofar as the obligations imposed by a State of Texas land purchase contract are concerned. They state without qualification that the purchaser's obligation is to pay the purchase price and that the State's obligation is to issue a patent whenever the purchaser's obligation has been performed. These cases are equally explicit in stating that the remedy or means by which the State enforces or terminates the contract may, within the limits prescribed by the Constitution, be modified from time to time.

Another case in point is that of *Aikin v. Kingsbury*, 247 U.S. 484 (1918). The *Kingsbury* case involved a land purchase contract situation similar to Appellee's and this Court stated at page 487:

> "The right of the State to foreclose such a contract for default in payment, and the right of the purchaser to redeem after a default decree relate to the remedy

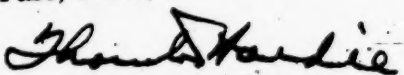
as distinguished from the obligation of the contract * * *"

F. CONCLUSION

Based on the foregoing, Appellant respectfully submits that the Honorable Supreme Court should allow this appeal.

Respectfully submitted

HARDIE, GRAMBLING, SIMS & GALATZAN,
Third Floor, El Paso Natural Gas Company Building,
El Paso, Texas,

By 
Attorneys for Appellant.

PROOF OF SERVICE

I, William J. Mounce of Hardie, Grambling, Sims & Galatzan, attorneys of record for the City of El Paso, Appellant herein, depose and say that on the 24th day of February, 1964, I served a copy of the foregoing Jurisdictional Statement for Appeal From the United States Court of Appeals for the Fifth Circuit on Greenberry Simmons, Appellee herein, by mailing, air mail postage prepaid, a copy of same to Mr. Greenberry Simmons, Attorney at Law, Kentucky Home Life Building, Louisville, Kentucky and by mailing a copy of said Jurisdictional Statement to Mr. Harold Long, Attorney at Law, El Paso National Bank Building, El Paso, Texas, attorney for Greenberry Simmons.

Wm J. Mounce

WILLIAM J. MOUNCE

SUBSCRIBED AND SWORN TO before me at El Paso, Texas, this 24th day of February, 1964.

Alicia Lee

Notary Public, El Paso County, Texas

APPENDIX

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19754

GREENBERRY SIMMONS, *Appellant,*

v.

CITY OF EL PASO, *Appellee.*

Appeal from the United States District Court for the Western District of Texas.

(July 18, 1963)

Before RIVES, JONES and BROWN, Circuit Judges.

JONES, Circuit Judge: Federal jurisdiction in this action was asserted on diversity of citizenship and under 28 U.S.C.A. §1655. It is difficult to see how Section 1655 has anything to do with jurisdiction in this case but since diversity of citizenship and the jurisdictional amount of a matter in controversy are present, the question need not be considered.

Predecessors of title of the appellant, Greenberry Simmons, on January 25, 1910, made written applications to purchase land in El Paso County, Texas, from the State of Texas, reciting in the applications that they were made "under the provisions of Chapter 47, Act of 1895, Chapter 129, Act of May 19, 1897, and other Texas statutes." The obligations of the applicants, who became purchasers of the lands, required the annual payment of one-fortieth of the principal and interest at three per cent. The obligations, accepted by the Texas Land Commissioner, recited the purchase of the described land "in accordance with the provisions of" the foregoing statutes of Texas.

The 1897 statute to which reference was made in the title instruments contained a provision that,

> "In any cases where lands have been forfeited to the State for the non-payment of interest, the purchasers or their vendees may have their claims reinstated on their written request, by paying into the treasury the full amount of interest due on such claim up to the date of reinstatement; provided, that no rights of third persons may have intervened. In all such cases the original obligations and penalties shall thereby become as binding as if no forfeiture had ever occurred." Texas Act, 1897, Ch. 197.

In 1941, the Texas Legislature reaffirmed the right to reinstate a contract of purchase after a forfeiture but imposed a five-year limitation period upon the exercise of the right with respect to forfeitures thereafter occurring. In the act it was provided:

> "In any case where lands may hereafter be forfeited to the State for non-payment of interest, the pur-

chasers, or their vendees, heirs, or legal representatives, may have their claims reinstated on their written request, by paying into the Treasury the full amount of interest due on such claim up to the date of reinstatement, provided that no rights of third persons may have intervened. The right to reinstate shall be limited to the last purchaser from the State or his vendees or their heirs or legal representatives. Such right must be exercised within five (5) years from the date of the forfeiture, and the right to reinstate any claim heretofore forfeited by the Commissioner must be exercised within five (5) years from the effective date of this Act, but not thereafter." Texas Acts 1941, Ch. 191.

In 1951 this statute was amended but not, apparently, in any particular which is here pertinent. Texas Acts 1951, Ch. 59.

On July 21, 1947, the land was forfeited to the State for non-payment of interest. On July 23, 1952, the land Commissioner of the State of Texas received from the appellant, who was the mesne grantee of the original purchasers, applications to reinstate the claims to the lands, with checks for the unpaid interest. On July 24, 1952, the Land Commissioner returned the applications and checks to the appellant with a letter in which it was said:

> "With reference to the reinstatement of forfeited accounts as set out under the provisions of Article 5326, Revised Civil Statutes, in order to reinstate a forfeited account, the forfeiting owner, his heirs or assigns, must exercise such right within five years from the date of forfeiture. To exercise such rights the application to reinstate and also payment of all interest and penalty must be received in the five year period.

"In considering this matter, our attorneys have decided to reject the applications to reinstate the above described lands and the applications were not received until July 23. Due to this fact, your applications are being returned together with your two payments received on July 23."

On May 23, 1955, the Texas Legislature authorized the sale to the City of El Paso of fourteen thousand acres of land in El Paso County, including the lands claimed by the appellant. The lands were patented to the appellee City on January 26, 1956. Another statute of the State of Texas, enacted in 1921, contained a provision that "No sale made without condition of settlement shall be questioned by the State or any person after one year from the date of such sale." Vernon's Ann. Tex. Stat. Art. 5329. The appellant brought an action in the nature of trespass to try title on August 31, 1961. The City asserted by defenses, the limitation of the 1941 and 1951 statutes, the bar of Article 5329, adverse possession, and that intervening rights and lapse of time had resulted in the appellant's claim being barred by laches. Both parties filed motions for summary judgment. The motion of the defendant was granted and judgment was entered that the appellant take nothing. From that judgment this appeal has been taken.

Although other issues are made by the claim asserted in the complaint and the defense set out in the answer, only two of these require present consideration. First, we must decide whether Article 5329 cut off the right of the appellant to question the validity of the sale to the City of El Paso. If this statute does not bar the appellant,

then we must ascertain whether the statutes of 1941 and 1951 work an impairment of the obligation of the contract of purchase with the result that the tender of the delinquent payments before any intervening rights arose reinstated the contract. As to the first of these questions, it would seem that if the application for reinstatement and tender of the delinquent interest made by the appellant were valid and effective so as to restore the rights which had been forfeited, the sale to the City of El Paso would have been illegally made and void. Statutes relieving from forfeiture are to be liberally construed in favor of the owner. The one-year limitation provisions would not be applicable if a reinstatement had been effected before the subsequent attempt to sell. *Davis v. Yates*, 63 Tex. Civ. App. 6, 133 S.W. 281. Se also *Lovett v. Simmons*, Tex. Comm. App. 29 S.W. 2d 1021; *Herndon v. Robinson*, Tex. Comm. App. 114 Tex. 446, 270 S.W. 159. We are then required to determine the second question.

It is said that "The books disclose numerous disputes which have arisen where land (in Texas), having been awarded to one person, thereafter was forfeited and awarded to another, the claim of the earlier purchaser depending upon the showing as to whether he was entitled to be reinstated to his rights under his contract of purchase." 34 Tex. Jur. 190, Public Lands §129. The contract between the appellant's predecessor in title and the State was made pursuant to the statute, and the provisions of the statute became terms of the contract. *Indiana ex rel Anderson v. Brand*, 303 U.S. 95, 58 S. Ct. 433, 82 L. Ed. 685, 113 A.L.R.

1482, reh. den. 303 U.S. 667, 58 S. Ct. 641, 82 L. Ed. 1123. See also *Dodge v. Board of Education*, 302 U.S. 74, 58 S. Ct. 98, 82 L. Ed. 57; *Hall v. Wisconsin*, 103 U.S. 5, 26 L. Ed. 302.

The United States Constitution provides that "No state shall * * * pass * * * any law impairing the obligation of contracts." U. S. Const., Art. I, Sec. 10. A Court of Civil Appeals of Texas has held that this constitutional provision "is violated whenever there is any invasion of the effect of the asserted contract in however small a particular, and it is not required that the contract be entirely or even materially impinged upon." *Simpson v. Pontotoc Common County Line School District*, Tex. Civ. App. 275 S.W. 449.

It is the obligation of the contract that is not to be impaired. A statute which merely changes the remedy does not, as a general rule, impair the obligation. *Aikens v. Kingsbury*, 247 U.S. 484, 38 S. Ct. 558, 62 L. Ed. 1226. Statutes of limitation refer to the remedy and not to the obligation of a contract and hence do not fall within the constitutional inhibition of statutes impairing the obligation of contracts. *Sturges v. Crowinshield*, 4 Wheat. 122, 4 L. Ed. 529. The statutory provision, forming a part of the contract, gave to the contract purchaser a right to reinstate his contract at any time before the rights of third persons intervened. This right of reinstatement was in the nature of a continuing option which the State could terminate only by the creation of a right in another. A Texas Court of Civil Appeals has declared that, "It is our duty to construe these laws so as to alleviate against the rigors of forfeiture, for

the law abhors a forfeiture." *State v. Walden*, Tex. Civ. App. 325 S.W. 2d 705. See also *Gulf Production Co. v. State*, Tex. Civ. App. 231 S.W. 124.

In construing the statutory language providing for reinstatement after forfeiture, it was held in the case last cited that the statute was embraced in the contract when it was entered into, and neither the state nor the purchaser could arbitrarily and without the consent of the other write into the contract any provision or condition varying, restricting or enlarging the terms of the contract; and, the payment of the delinquent interest before the intervention of rights of a third party being the only condition to reinstatement, the state could not impose a different or additional condition. 231 S.W. 124, 131. The right of reinstatement is a vested right which is entitled to protection of constitutional guarantees. See *Anderson v. Neighbors*, 94 Tex. 236. 59 S.W. 543. The statute, in force when the purchase was made, which gave to the purchaser a right to redeem from forfeiture, was not one dealing with a remedy, but on the contrary created an obligation of the state to reinstate the contract if payment was made before the intervention of the rights of others. The state could not impair this right, as it attempted to do by the 1941 and 1951 Acts. Cf. *Home Insurance Co. v. Dick*, 281 U.S. 397, 50 S. Ct. 338, 74 L. Ed. 926, 74 A.L.R. 701. The tender made by the appellant, assuming it has been or will be kept good, reinstated the contract.

The district court did not consider the defenses of adverse possession and laches. If sustained by the preponderance

of evidence one or more of these defenses might defeat the appellant's claim. Therefore a remand is required for the trial of these issues.

REVERSED AND REMANDED.

Article 4218f. When any portion of said land has been classified to the satisfaction of the commissioner of the general land office, under the provisions of this chapter or former laws, such lands shall be subject to sale, but to actual settlers only, except where otherwise provided by law, and in quantities of not less than eighty acres or multiples thereof, nor more than four sections containing six hundred and forty acres, more or less; provided, that the purchaser shall not include in his purchase more than two sections of agricultural land; and provided, that where there is a fraction less than eighty acres of any section left unsold, such fraction may be sold. Any bona fide purchaser who has heretofore purchased or who may hereafter purchase any lands as provided herein shall have the right to purchase other lands in addition thereto; provided, that the total of his purchases shall not exceed four sections and that it shall not include more than two sections of agricultural land, upon his making oath that he is not acting in collusion with others for the purpose of buying the land for any other person or corporation, and that no other person or corporation is interested in the purchase thereof. And if he or his vendor has already resided upon his home section for three years, or when he or his vendor, or both together, shall have

resided upon it for three years, the additional lands purchased may be patented at any time. In all cases where a settler purchases more than one section the lands in excess of one section so purchased must be situated within a radius of five miles of the land occupied by him. Where any of the lands referred to in this act have been sold prior to July 30th, 1895, in quantities greater or less than forty acres or multiples thereof, and are in good standing as to interest payments, they may be patented in such quantities. In any cases where lands have been forfeited to the State for non-payment of interest, the purchasers or their vendees may have their claims reinstated on their written request, by paying into the treasury the full amount of interest due on such claim up to the date of reinstatement; provided, that no rights of third persons may have intervened. In all such cases the original obligations and penalties shall thereby become as binding as if no forfeiture had ever occurred.

Senate Bill 295, Acts of the 54th Legislature, Chapter 278, 1955.

Section 1. The Commissioner of the General Land Office is hereby authorized to sell to the City of El Paso, El Paso County, Texas, for a total consideration based on the aggregate fair and reasonable market value of said land, but no less than $6.50 per acre, as determined by two appraisers appointed by the Commissioner of the General Land Office

of Texas, the following described Public School Lands situated in El Paso County, and described as follows, to-wit:

(AMONG OTHER LANDS)

N½ of Section 240
N. D. Mundy Survey
Containing 328.65 acres

Section 235
L. E. Mundy Survey
Containing 292 acres

and aggregating 14,000.15 acres. Said lands shall be sold upon the filing in the General Land Office of an application to purchase by the proper authority of the City of El Paso accompanied by payment of the full consideration herein provided. Such sale shall be subject to any right-of-way easements, surface leases, or any oil, gas mineral leases or permits theretofore given by the State on said lands. All Mines and minerals and mineral rights, including oil and gas in and under said lands, together with the right to enter thereon for the purpose of exploration and development, are hereby reserved to the State of Texas, and said lands shall be subject to lease by the State for mineral exploration and development in the same manner as is now, or may hereafter be provided for the leasing of unsold Public Free School Lands; provided, however, that the School Land Board or other legally constituted authority offering said lands for lease shall place in said leases such rules and regulations as may be deemed proper by said board or agency for the prevention of pollution and contamination of the fresh waters in, on and under said lands.

Section 2. Upon payment of the purchase money provided herein, payments of fees required by law, and the filing in the General Land Office of any field notes or corrected field notes required by the Commissioner of the General Land Office, patents shall be issued to the City of El Paso containing the reservations provided for in Section 1 of this Act.

Section 3. The fact that the City of El Paso is in urgent need of expanding its sources of water and of protecting water wells previously drilled creates an emergency and an imperative public necessity that the Constitutional Rule that each bill be read on three separate days in each House be suspended, and such Rule is hereby suspended, and this Act shall take effect from and after its passage, and it is so enacted.

Office-Supreme Court, U.S.
FILED
MAR 14 1964
JOHN F. DAVIS, CLERK

No. ~~856~~ 38

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963

CITY OF EL PASO, - - - - - - Appellant,

versus

GREENBERRY SIMMONS, - - - - - Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION TO DISMISS [AND/OR] AFFIRM.

HAROLD S. LONG,
El Paso National Bank Bldg.,
El Paso 1, Texas,

GREENBERRY SIMMONS,
Kentucky Home Life Building,
Louisville, Kentucky,
Counsel for Appellee.

March 10, 1964.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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Statutes:

Vol. 16 Vernon's Ann. Civ. St. Tex., Art. 5509, p. 363 (Adverse Possession) 3, 4, 9

Texas Acts, 1897, Ch. 129, pp. 184-185 (now after several amendments, Vol. 15A, Vernon's Ann. Civ. St. Tex., Art. 5326). Both set out in Appendix D, pp. 56, 59 5

Miscellaneous:

Supreme Court of United States, Rule 16 1

5 Am. Jur. 2d Appeal and Error, Sec. 937 4

2 Tex. Jur. 2d Adverse Possession, Sec. 217 6

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963

No. 866

CITY OF EL PASO, - - - - - *Appellant,*

v.

GREENBERRY SIMMONS, - - - - - *Appellee.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION TO DISMISS [AND/OR] AFFIRM.

Appellee, pursuant to Rule 16 (1) of this Court, moves to dismiss [and/or] that the judgment and decree of the Court of Appeals for the Fifth Circuit be Affirmed and Modified by changing "Reversed and Remanded" to "Reversed and Judgment for Appellant Simmons" (Appellee here), on the ground that the question presented is so unsubstantial as not to need further argument.

STATEMENT.

This is an appeal from a judgment and decree entered on September 26, 1963 by the Court of Appeals for the Fifth Circuit, reversing, giving judgment to Simmons and remanding to the United States District

Court for the Western District of Texas, El Paso Division, stating the District Court had not considered the City's defenses of adverse possession and laches.

The District Court had sustained the City's Motion for Summary Judgment and denied Simmons' Motion for Summary Judgment and dismissed the suit. The District Court filed no written Opinion. There is nothing in the Printed Record which counsel for Simmons can find, to show that District Court did not consider the City's defenses of adverse possession and laches.

The primary question decided by the Court of Appeals, in its decision below, was that Simmons' contract obligations were impaired by the legislative acts, in violation of the rights given Simmons under the Contract Clause and Due Process Clause of the Constitution of the United States.

The Court further decided that Simmons was the equitable and record owner of the lands, and had a contractual right to have the legal title delivered to him, and under these conditions the resale of the same lands to the City, without any compensation and without notice to Simmons, was illegal, void and unconstitutional insofar as it violated the rights given Simmons under the Contract Clause and Due Process Clause. *Simmons* v. *City of El Paso*, 320 F. 2d 541, 544.

However, the Court of Appeals remanded the suit to give the City the opportunity of presenting its defenses of adverse possession and laches.

In order for the City to prove its defenses under adverse possession, it must have a deed or deeds duly registered,[1] and the only "deed or deeds duly registered" it has is this illegal, void and unconstitutional sale to use as a basis for its adverse possession claim.

ARGUMENT.

An unconstitutional sale cannot be later used as a required basis, for a defense, between the same parties, in the same suit.

> "An unconstitutional law is not a law, it confers no rights, it imposes no duties, it affords no protection, it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton* v. *Shelby County*, 118 U. S. 425, 442, 6 S. Ct. 1121, 30 L. Ed. 178.

The City has acted under an unconstitutional act, and here, "it affords no protection" to the City, either at a later date or here and now. It is of no effect.

It is the contention of Simmons that it is useless to have to go back to the District Court and then come all the way to the Supreme Court again, when all the City has for its required deed or deeds duly registered is the one unconstitutional instrument, upon which to base its adverse possession claim.

Regardless of this Statute, Art. 5509, Appendix A, may be construed and applied, this unconstitutional sale cannot be used as a basis, for a defense, in the same suit between the same parties. If it is permitted to

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[1]Vol. 16 Vernon's Ann. Civ. St. Tex. Art. 5509, p.363. Appendix A., p. 9.

be used, then the adverse possession Statute, Art. 5509, as so construed and applied violates the rights given Simmons under the Due Process and Contract Clause. Cf. *Home Insurance Co.* v. *Dick,* 281 U. S. 397, 74 A.L.R. 701. Cited by the Court of Appeals in its Opinion at p. 545.

If it is for the best interest of both parties to modify the judgment and end protracted litigation, the court will usually do so. *Patterson* v. *Mobile Gas Co.,* 271 U. S. 131, 46 S. Ct. 445, 70 L. Ed. 870. 5 Am. Jur. 2d Appeal and Error, § 937.

The judgment may then be affirmed as modified in cases tried in equity and without a jury. Cf. *Santa Fe County* v. *New Mexico,* 215 U. S. 296, 30 S. Ct. 111, 54 L. Ed. 202.

On October 30, 1963 Simmons complied with the Court of Appeals Opinion in tendering again all the interest and also, all the principal due under these contracts to the General Land Commissioner[1] for the State of Texas.

The two Supreme Court cases relied on by the City are inapplicable here, because they refer to the forfeiture part of the statute, whereas, here we have a reinstatement of lands which were already forfeited. When those early cases were decided there was no provision for forfeiture in the statute and therefore it was not a specific part of the contract. On the other hand, there has always been and is still a specific provision in the statute, which in this suit is part of the con-

[1]Certified copies of records of the General Land Office for the State of Texas. Appendix B, C of this motion, pp. 10-16.

tract, and consequently a specific provision in the contract, concerning reinstatement of lands which are already forfeited, "provided, that no rights of third parties may have intervened".[1] This meant where the State had not resold the land to another before reinstatement was applied for by the present equitable owner, who had been holding vested rights and paying on them for several years, and in this suit for over thirty years.

Simmons in District Court, filed a printed brief on his Motion for Summary Judgment. That same printed brief was filed in the Court of Appeals with additions of, Brief of Argument, Rider Sheet and record page numbers added and is filed here, as Simmons' Appendix D, to this motion. Forty copies of Simmons' Appendix D are filed here, but because of its length are separated from this motion.

Further details of the Constitutional question, herein involved, may be found in Point IV of Simmons' Appendix D, pp. 43-52. Brief and Summary of Argument, pp. 16g-16i and due process, p. 46. However, the Opinion of the Court of Appeals seems to well cover the Constitutional questions involved here. *Simmons v. City of El Paso*, 320 F. 2d 541.

The equities of Simmons are substantiated entirely by certified copies of records and documents as recorded in the Land Office and the County Clerk's Office,

[1]Appendix D, p. 56, reinstatement of land already forfeited statute, Texas Acts 1897, Ch. 129 pp. 184-185, which was also cited in the "OBLIGATION" part of both contracts, printed Record, pp. 43, 67.

covering over 85 pages of the Printed Record.[1] The equitable title obtained by settlers in 1910, who built their homes on these homesites and had to live on them for the required three years,[2] obtained vested rights in these contracts which have been well settled by Texas cases for over half a century,[3] and confirmed by the Court of Appeals' opinion here. These settlers were the predecessors in title of Simmons.

The City has no title to these lands. It cannot and has not shown that record owner Simmons had actual notice of the City's claim to these lands, and the claim of laches, in Texas is determined by the period of the adverse possession statute, there can be no guilt of laches on the part of Simmons. *Murphy* v. *Welder*, 58 Tex. 235 (Tex. S. Ct. 1883, before S. W. Reporter). For list of supporting cases, 2 Tex. Jur. 2d Adverse Possession § 217.

Looking through form to substance, as a Court of Equity may do in this suit, the summarily sustaining of this motion to affirm with modification, will relieve and assist this Honorable Court from having to hear a useless and unnecessary oral argument.

We respectfully suggest, that the affirmance with modification in many other similar suits, may be seriously considered in the future as more usable procedure to cope with the increasing volume of suits, and assist-

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[1]Nine extra copies of the Printed Record have been filed in the Clerk's Office and made available. R., pp. 36-125. A summary of equities and statement is in Brief of Argument, pp. 16b-16d of Appendix D.

[2]R., pp. 46, 48, 69.

[3]Appendix D, pp. 16h, 16f, 30, 33.

ing all parties by helping to eliminate multiplicity of arguments and unnecessary retrials."

With the entire Record and Simmons' appendices available, and the City having had its day in court, this seems to be all that will ever be substantially presented in this suit, no matter how many times it comes before a court, and we earnestly believe it is now in condition for summary affirmance with modification.

We respectfully submit, therefore, that Simmons has for 2½ years been showing that the City has no interest in this land and that a further long inequitable delay can be averted, and that the administration of justice may prevail for both the Appellant and the Appellee by the modification of the judgment and decree in the Court of Appeals, by changing "Reversed and Remanded" to "Reversed and Judgment for Appellant Simmons" (Appellee Simmons here) and that the judgment and decree as thus modified, should be affirmed.

HAROLD S. LONG,
El Paso National Bank Bldg.,
El Paso 1, Texas,

GREENBERRY SIMMONS,
Kentucky Home Life Bldg.,
Louisville, Kentucky,
Counsel for Appellee.

March 10, 1964.

PROOF OF SERVICE.

I, Greenberry Simmons, one of the Attorneys for Greenberry Simmons, Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby Certify that on the 12th day of March 1964, I served copies of the foregoing Motion to Dismiss [and or] Affirm, on the Appellant, City of El Paso, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to the respective Attorneys of record as follows:

To Thornton Hardie, Esq.
To William J. Mounce, Esq.
Attorneys for Appellant, City of El Paso,
El Paso Natural Gas Company Bldg.,
El Paso, Texas.

Signed: Greenberry Simmons,
Attorney for Greenberry Simmons,
Kentucky Home Life Bldg.,
Louisville, Kentucky.

APPENDIX A.

The Adverse Possession Defense of City (Appellant Here), Requires a "Deed or Deeds Duly Registered" as a Basis for Its Defense. It has None Except Its Unconstitutional Sale Obtained from the State Which Created This Municipal Corporation. This is the Texas Statute Involved.

Vol. 16 Vernon's Ann. Civ. St. Tex. Art. 5509, p. 363; Texas Acts 1897 p. 132; G. L. Vol. 8, p. 1432.

Art. 5509 [5674] [3342] [3193] Five years' possession

Every suit to recover real estate as against a person having peaceable and adverse possession thereof, cultivating, using or enjoying the same, and paying taxes thereon, if any, and claming under a *deed or deeds duly registered*,[1] shall be instituted within five years next after cause of action shall have accrued, and not afterward. This article shall not apply to one in possession of land, who deraigns title through a forged deed. And no one claiming under a forged deed, or deed executed under a forged power of attorney shall be allowed the benefits of this article. Id., Acts 1879, p. 132; G. L. vol. 8, p. 1432.

[1]Emphasis added.

APPENDIX B.

Simmons' Compliance with the Court of Appeals Opinion at p. 545.

"The tender made by the Appellant, assuming it has been or will be kept good, reinstated the contract." *Simmons* v. *City of El Paso*, 320 F. 2d 541, 545.

Certified Copy of the Records of the Texas General Land Office, Made By the General Land Commissioner, of a Letter Dated October 26, 1963, from Greenberry Simmons, Appellee, Tendering again all Interest and all Principal Due on These Contracts. It is Stamped "Received October 30, 1963, General Land Office."

GREENBERRY SIMMONS
Attorney at Law
Kentucky Home Life Building
Louisville 2, Kentucky

October 26, 1963

Mr. Jerry Sadler, Commissioner
General Land Office for the State of Texas
Austin 14, Texas

Dear Mr. Sadler:

Re: N/2 Survey 240, N. D. Mundy, El Paso County,
File No. 147016 and other file numbers.
Survey 235, Laura E. Mundy, El Paso County,
File No. 112121 and other file numbers.

In order to comply with the Court's opinion and the Land Purchase Contracts of 1910 involved and the latter is already filed in the Land Office, enclosed are the following pertaining to the above specified parcels of land:

1. Certified Copy of the Judgment in Greenberry Simmons v. City of El Paso entered September 28, 1963 by the U. S. Court of Appeals for the Fifth Circuit.

2. Letter dated Sept. 28, 1963 from the Clerk of that court pertaining to this Certified Judgment.

3. Copy of the opinion of the Court is reported in 320 F. 2d 541.

4. Certified Copies of Deeds recorded in the County Clerk's office of El Paso County, Texas:

A. D. H. Heineman, heir of D. G. Heineman, grantor to Greenberry Simmons, grantee. Recorded 7/14/52.

B. Affidavit of Heirship of D. H. Heineman, Recorded 7/14/52.

C. Tella H. Heineman, grantor to Greenberry Simmons grantee, Recorded 7/14/52.

D. Affidavit of Heirship of Tella H. Heineman, Recorded 7/ 14/52.

5. Two applications of Greenberry Simmons to reinstate the forfeited lands and two duplicated checks (not to be cashed) for all back interest, as was tendered in 1952.

Please file all the above instruments and charge the filing fees to my Account No. 742.

6. Current checks for all principal and all interest due on N/2 Survey 240 N. D. Mundy, El Paso County as follows:

A. All Principal	$492.98
B. All back interest to July 23, 1952	430.11
C. All back interest from July 23, 1952 to date	171.62

7. Current Checks for all principal and all interest due on Survey 235 Laura E. Mundy as follows:

A. All Principal	$438.00
B. All Interest to July 23, 1952	251.02
C. All Interest from July 23, 1952 to date	148.92

We believe that the above checks pay all amounts due in full under the Land Purchasing Contracts of 1910 and

the court's opinion. However we are tendering a further check to pay any other sums which you believe are due under the contracts and court's opinion and the balance left over to be added to my charge account #742, in the Land Office. This tendered check is for one thousand dollars.

The total of all seven checks tendered is twenty nine hundred thirty two dollars and sixty five cents. This should be much more than the total amount due.

It may be surprising to realize, the fact that my predecessors in title and I have paid the State, over three times the $1.50 contracted purchase price for these lands. In addition Settlers Glenn and Kilpatrick lived 3 years on these homesite lands to acquire the vested rights in these 3 year Residential Occupational Certificates. These were recorded in 1913 in the Land Office and the County Clerk's Office, as our Muniments of Title. Acts May 16, 1907 pp. 495-496.

I received a letter from the Acting Commissioner of the Land Office on September 6, 1952 with reference to the D. G. Heineman properties, saying "after patent is issued, all title inures to the benefit of the legal owners • • • ". Is this position still maintained by the Land Office?

If you have other suggestions I will be glad to hear from you or if you think best call me collect, Louisville, Ky., Area Code No. 502, Tel. 451-4314 or 583-8905.

Sincerely yours,

Reply to this address:

(s) Greenberry Simmons,
1484 Cherokee Road,
Louisville, Kentucky.

Encs. 17

Page one has the following notations:

CK 438.00 16103
CK 430.11 16104
CK 171.62 16105
CK 492.98 16106
CK 251.02 16107
CK 148.92 16108
CK 1,000.00 16109

RECEIVED
OCT 30 1963
GENERAL LAND OFFICE

Page two has the following notations:
Nos. 16103, 16104, 16105, 16106, 16107, 16108, 16109.

GENERAL LAND OFFICE, AUSTIN, TEXAS,
November 21, 1963

I, JERRY SADLER, Commissioner of the General Land Office of the State of Texas, do hereby certify that on the reverse hereof is a true and correct copy of the original of this instrument now on file in this office together with all endorsements thereon.

IN TESTIMONY WHEREOF, I, hereunto set my hand and affix the seal of said office the day and date first above written.

Commissioner of the
General Land Office

Jerry Sadler
(Seal)

APPENDIX C.

Certified Copy of the Records in the Texas General Land Office of a Letter of Jerry Sadler, Commissioner, Acknowledging the Receipt of the Tender of Interest and Principal Tendered in Simmons' Letter of October 26, 1963. Such Tender Was Made Again by Simmons to Comply with the Court of Appeals Opinion. Simmons v. City of El Paso, 320 F. 2d 541, 545.

November 13, 1963

Mr. Greenberry Simmons
Attorney at Law
1484 Cherokee Road
Louisville, Kentucky,

Re: Files 147016 & 112121
El Paso County, Texas

Dear Mr. Simmons:

This will acknowledge receipt of your letter dated October 26, 1963, with enclosures pertaining to the above referenced matter.

We have examined your request as contained in your correspondence and find that such requested action is not appropriate at this time. We are therefore returning to you the following:

1. Certified Copy of the Judgment in Greenberry Simmons v. City of El Paso entered September 28, 1963 by the U. S. Court of Appeals for the Fifth Circuit.

2. Letter dated September 28, 1963 from the Clerk of that court pertaining to this Certified Judgment.

3. Copy of the opinion of the Court is reported in 320 F. 2d 541.

4. Certified Copies of Deeds recorded in the County Clerk's office of El Paso County, Texas.

A. D. H. Heineman, heir of D. G. Heineman, grantor to Greenberry Simmons, grantee. Recorded 7/14/52.

B. Affidavit of Heirship of D. H. Heineman. Recorded 7/14/52.

C. Tella H. Heineman grantor to Greenberry Simmons grantee. Recorded 7/14/52.

D. Affidavit of Heirship of Tella H. Heineman. Recorded 7/14/52.

5. Two applications of Greenberry Simmons to reinstate forfeited lands and two duplicated checks (marked not to be cashed).

6. Seven (7) original checks returned direct herewith as follows:

General Land Office Register No. 16103	$ 438.00
General Land Office Register No. 16104	430.11
General Land Office Register No. 16105	171.62
General Land Office Register No. 16106	492.98
General Land Office Register No. 16107	251.02
General Land Office Register No. 16108	148.92
General Land Office Register No. 16109	1,000.00

Yours very truly,

Jerry Sadler, Commissioner.

JS:ths
Enclosures

Register Nos. 16103, 16104, 16105, 16106, 16107, 16108, 16109

REGISTERED MAIL
RETURN RECEIPT
REQUESTED

GENERAL LAND OFFICE, AUSTIN, TEXAS,
November 21, 1963.

I, JERRY SADLER, Commissioner of the General Land Office of the State of Texas, do hereby certify that on the reverse hereof is a true and correct copy of the original

of this instrument now on file in this office together with all endorsements thereon.

IN TESTIMONY WHEREOF, I, hereunto set my hand and affix the seal of said office the day and date first above written.

Commissioner of the
General Land Office

Jerry Sadler

(Seal)

APPENDIX D.

Appellee Simmons' Appendix D, is Separated from This Motion in 40 Separate Copies, As It is Rather Large To Be Attached To This Motion.

The Constiutional questions may be found summarized at pages 16g-16i and also in Point IV, pages 43-52. Summary of Equities and Statement is in Brief of Argument, pp. 16b-16d. At page 16i Simmons asked that the District Court judgment be reversed and that Simmons' Motion for Summary Judgment be sustained and judgment for Simmons. Likewise in District Court on petition for Rehearing and Motion, he asked for setting aside of the judgment and judgment for Plaintiff Simmons. R. 138, 142.

It is the Brief previously printed for the District Court by Plaintiff Simmons and the same printed Brief used by Appellant Simmons in the Court of Appeals, with additions of Rider Sheet, Brief or Summary of Argument, and all record page numbers involved added.

The City has probably received more from this land than the money it has spent on it, exclusive of attorney fees, and except the purchase price, which it can get back from the State. Appendix D, p. 5(6).

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 19,754

GREENBERRY SIMMONS, - - - - - Appellant,

versus

CITY OF EL PASO, - - - - - - Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS.

BRIEF FOR APPELLANT.

HAROLD S. LONG,
Caples Building,
El Paso, Texas,

GREENBERRY SIMMONS,
Kentucky Home Life Building,
Louisville 2, Kentucky,
Attorneys for the Appellant.

October 5, 1962.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

RIDER SHEET.

This is an appeal fom an Order of Dismissal which was entered by the District Judge.

This brief was printed for the District Court. No written opinion was filed by the Court. The Plaintiff's Motion for Summary Judgment was Denied (R. 34, 143-145).

The Defendant's Motion for Summary Judgment was sustained, and the suit dismissed with Judgment for the Defendant (R. 143-145).

Plaintiff's Motion and Petition for Rehearing calling attention to the claimed errors was overruled (R. 133-138).

The Appellant will be referred to throughout this brief as the Plaintiff and the Appellee will be referred to as the Defendant.

The *Specification of Errors* will be found on Page 16-a of this brief. *The Brief of Argument* will be found on Page 16b-16i.

I, Greenberry Simmons, certify that I have this 5th day of October, 1962, mailed a copy of this brief to Mr. Morris A. Galatzan, El Paso Natural Gas Building, El Paso, Texas, Attorney of Record for the Appellee, City of El Paso.

(s) GREENBERRY SIMMONS

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UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

Civil No. 2334.

GREENBERRY SIMMONS, - - - - - *Plaintiff,*

v.

CITY OF EL PASO, - - - - - *Defendant.*

BRIEF FOR PLAINTIFF ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

JURISDICTION.

Jurisdiction of this action exists by the virtue of the diversity of citizenship between the defendant and the plaintiff and the controversy exceeds exclusive of interest and cost, the sum of $10,000.00. 28 U.S.C.A. 1332. *Ely* v. *New Mexico and A. R. Co.,* 129 U. S. 291.

The defendant in its answer has admitted Paragraph 1 of the plaintiff's complaint. R. 1

Jurisdiction is further found on title 28 U.S.C.A. 1655 involving the question of title to real estate located within this District. *Louisville and Nashville Railway Company* v. *Western Union Telegraph Company,* 234 U. S. 369, 377-378 (1914). *Porter* v. *Cook,* 63 F. 2d 637, C.A. 5, 1933. R. 5

THE QUESTIONS.

1. There is no genuine issue as to any material fact and is plaintiff entitled to a judgment as a matter of law under F.R.C.P., Rule 56?

2. Did plaintiff substantially comply with the requirements of the Act in the reinstatement of his forfeited lands in 1952?

3. If plaintiff did legally reinstate his land or if he did not do so, was it the duty of the Attorney General of the State of Texas to adjudicate and clear plaintiff's claim, on record in the Land Office, including the contract of 1910, to the title to these lands before they could be offered again for resale by the Land Commissioner?

4. If the Land Commissioner and his attorneys were correct in refusing plaintiff's reinstatement, because the legislative amendments in the Acts of 1941, 1951, and the Act of 1955, then do these legislative Acts taken together impair the obligation of contract, insofar as they attempt to apply to contracts made before their enactment, and are unconstitutional?

STATUTES INVOLVED.

1. *Acts 1897 c. 129 p. 185* Statute in force when contract in 1910 was made covering reinstatement of forfeited lands. The portion of the statute involved is as follows:

> "In any case where lands have been forfeited to the state for non-payment of interest, the purchasers or their vendees may have their claims reinstated on their written request, by paying into the treasury the full amount of interest due on such claim up to the date of reinstatement; provided, that no right of third persons may have intervened. In all such cases, the original obligations and penalties shall thereby become as binding as if no forfeiture had ever occurred."

The entire section of the above statute may be found in the Appendix, No. 1, to this brief with the portion of the statute involved marked for emphasis.

2. *Acts 1941, 47th Leg., p. 351, ch. 191, Sec. 3; Acts 1951, 52 Leg., p. 92, ch. 59, Sec. 2.* Art. 5326, formerly Art. 5423, Vernon's Civil Statutes of the State of Texas, Annotated. The above Acts of 1897 found, in No. 1, above was changed and amended in 1941 and 1951, by the State Legislature and among other basic changes, the portion of the statute involved added 5 years limitation, as follows:

> "* * * Such right must be exercised within five (5) years from the date of the forfeiture. * * *"

The entire Section of each of the two Acts, the 1941 Act and the 1951 Act will be found in the Appendix, No. 2, No. 3, to this brief with the pertinent portions pertaining to the reinstatement of forfeited land marked for emphasis.

3. *Acts, Feb., 1900, Sec. 8, ch. 11, p. 29 at pp. 33-34.* See Session Acts 1900 First Called Session, p. 29 at pp. 33-34. (Entire Section in Appendix No. 5.)

The above Act was the Act in force at the time the contract was made in 1910, and it involves the duty of the Attorney General for the State of Texas to clear titles to land where there is someone claiming that title, before it can be resold by the General Land Commissioner. The portion of the statute involved is as follows:

> "When any of the lands described in this Act, or any of the other public lands of the state held are owned by any fund, or any land in which the state, or any such funds have an interest, are held, occupied or claimed by any person or association or a corporation, adverse to the state, or to such fund, it shall be the duty of the Attorney General to institute suit therefor," etc.

The above Act was passed in 1900 and stayed the same until 1939 and this Act is taken from Mr. Chief Justice Gaines' quotation of the statute in the case of *Juencke* v. *Terrell,* 98 Tex., 237, S. Ct. Tex. 1904, 82 S. W. 1025, 1026, and is quoted in entirety, in 1914 by Court of Appeals for 5th Circuit, *Southern Pine Lumber Company* v. *Consolidated Lumber Company,* 217 F. 719, 724-725.

The above Act, after the 1939 revision, was and now reported as Article 5420, Vernon's Civil Statutes of the State of Texas, Annotated.

4. State of Texas, *Senate Bill No. 295, Ch. No. 278, 56th Legislature, regular session 1955, May 20, 1955,* recorded in the Secretary of State's Office May 23, 1955. This Act is not in any of the Vernon's Civil Statutes of the State of Texas. See the Appendix No. 4, of this brief for a certified copy of this Act.

The above Legislative Act granted to the Commissioner of the General Land Office authority to resell, settlers vendees land to the State's own Municipal Corporation, the City of El Paso, the defendant.

5. *Art. 5409, 5374, 4189* Conflicting title; cancellation. 1883, p. 113, G.L. Vol. 9, p. 1419. This statute merely tells how the defendant can apply to the General Land Office, to refund the amount of money which they formerly paid the Land Commissioner in view of the prior conflicting title.

6. *Art. 5411, 5378, 5404* Purchase money refunded. 1883, p. 113, G.L. Vol. 9, p. 419. This statute merely provides in case the defendant loses this action that they will be entitled to get their purchase money refunded upon the returning of their patents to the Land Commissioner.

SECTIONS OF THE CONSTITUTION OF THE UNITED STATES, INVOLVED.

Art. 1, Sec. 10 of the Constitution of the United States. Portion involved is as follows:

> "* * * No state shall * * * pass any * * * law impairing the obligation of contract * * *."

STATEMENT OF CASE.

The controversy in this case is that both plaintiff and defendant are claiming the same lands located in El Paso County, Texas. Both claim title from the General Land Commissioner for the State. Plaintiff's prior title depends upon whether he, as a matter of law, reinstated his forfeited lands in July 1952. If he did, defendant's subsequent patents are of no avail.

I. The Contracts and Awards of Settler's Vendee Made in 1910 Are Sources of Plaintiff's Titles.

January 30, 1910 settlers, W. H. Glenn and John B. Kilpatrick, made application to the Land Commissioner of the State of Texas "For Land Addition to Home Tract". On April 30, 1910 the awards were made to them by the Land Commissioner. R. 43-44, 67-68

The defendant in his Response to plaintiff's Request for Admission, admitted the genuineness of these certified official records in the General Land Office. R. 20

II. The Contract Includes Chapter 129, Act 1897.

Both contracts[1] made with the state provided in the first two lines:

> "I hereby apply to purchase under the provisions of Chapter 47, Act of 1895, and *Chapter 129, Act of May 19, 1897*, and the Acts approved April 19, 1901, April 15, 1905, and May 16, 1907, the following land * * *." (Emphasis added.)

When the state made the awards[2] on April 30, 1910, the *Act of 1897, Chapter 129* became part of these contracts. The award is attached to the application-contract, all three are in one official instrument.

Three years later both settlers, Glenn and Kilpatrick were issued three years Occupational Certificates[3] by Land Commissioner, showing that they had lived on the land and improved the land for over the three-year period.

Throughout the following years the interest was paid on the contracts and the land by deeds were taken over by heirs and the subsequent vendees. Records of same are in the Land Office and County Clerk's Office, El Paso County, Texas. Plaintiffs' Exhibits Nos. 1 to 33A. R. 43 125

On July 21, 1947 the lands were forfeited to the State of Texas for non-payment of interest. R. 63 101

For the purposes of this brief the General Land Office Commissioner and the General Land Office may

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[1, 2]Plaintiffs' Exhibits Nos. 1, 16. (Application, Contract and Award all in one instrument and Award signed by Land Commissioner.) R. 43 44

[3]Plaintiffs' Exhibits Nos. 2, 17. R. 46, 48 69 67-68

be referred to as the Land Commissioner and the Land Office.

The Land Commissioner had never required deeds to be filed in his office,[1] when the heirs or the vendees had forfeited land reinstated in his office, however, he did have a form No. G142-444-5M which he sent to those claiming to be the owners who wished to reinstate the forfeited land. This form among other things provided:

> 1. Sworn statement by the owner or his legal representatives state that (blank, name to be filled in) was "the owner of the following described land."
>
> 2. "That the above land has been forfeited for the non-payment of interest and affiant hereby tenders all delinquent interest and requests that this tract be reinstated."

The Land Commissioner's requirements were only as to who claimed to own the land and pay all the back interest to have it reinstated. He required no other proof of ownership; provided no rights of third parties had intervened insofar as his office was concerned.

On July 23, 1952 the Commissioner received the above forms filled in, claiming ownership of the involved land and tendering all interest due, from this plaintiff.[2] The Land Commissioner replied by his letter of July 24, 1952 acknowledging the receipt of these claims to these lands and checks for the interest;

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[1]Plaintiffs' Exhibits Nos. 33, 33A. Letter of Acting Commissioner Wallace, September 6, 1952, to the plaintiff. Defendant has admitted the genuineness of this letter. R 123, 125

[2]Plaintiffs' Exhibits Nos. 32B, 32C, 32D, 32E. R 120, 121

also acknowledged the telephone conversation between his office and the plaintiff about reinstatement, on July 21, 1952.

III. The Land Commissioner's Letter Acknowledges Request For Reinstatement of the Forfeited Lands and Payments For Same But Refused It, Based on the Wrong Act of 1951.

The Land Commissioner said:

> "* * * the forfeiting owner his heirs or assigns, must exercise such right within five (5) years from the date of the forfeiture."

A certified copy of the letter[1] which is on file in the Land Commissioner's Office, and is now and has been ever since July 24, 1952 the date written and is part of the official record of the Land Commissioner's Office, which is as follows:

"July 24, 1952

Mr. Greenberry Simmons
Western Lodge
Box 647
Van Horn, Texas

Dear Mr. Simmons:

This is in reply to your telephone conversation with Mr. Leggott on July 21, 1952 in regard to the reinstatement of Section 235, L. E. Mundy Survey, and the N 2 of Section 240, N. D. Mundy Survey, both in El Paso County, Texas.

[1]Plaintiffs' Exhibits No. 32, (No. 32A). Certifications on all Plaintiffs' certified copies, fulfill authentication under Rules 44, (43), F.R.C.P. (also see, Texas Statute, Arts. 5262, 5265).

With reference to the reinstatement of forfeited accounts as set out under the provisions of Article 5326, Revised Civil Statutes, in order to reinstate a forfeited account, the forfeiting owner, his heirs or assigns, must exercise such right within five years from the date of forfeiture. To exercise such rights the application to reinstate and also payment of all interest and penalty must be received in the five year period.

In considering this matter, our attorneys have decided to reject the applications to reinstate the above described lands and the applications were not received until July 23. Due to this fact, your applications are being returned together with your two payments received on July 23.

I am also returning your application to reinstate Section 24, Block 70, Township 1, in Hudspeth County together with your check in the amount of $1,158.11 and a signed check for blank amount.

Sincerely yours,

BASCOM GILES, *Commissioner of the General Land Office*"

CRL:jw
Encs."

Certified Copies of above letter have been received from Mr. Jerry Sadler, the present General Land Commissioner for the State of Texas, one dated October 18, 1961, the other dated July 26, 1961. The certifications are as follows:

GENERAL LAND OFFICE, AUSTIN TEXAS

October 18, 1961

I, JERRY SADLER, Commissioner of the General Land Office of the State of Texas, do hereby certify that on the reverse side hereof is *a true and correct copy of the original of this instrument now on file in this office*[1] together with all endorsements thereon and further certify that I am the officer who has the custody of the filed original official records from which these true Certified Copies were made.

IN TESTIMONY WHEREOF, I, hereunto set my hand and affix the seal of said office the day and date first above written.

(s) JERRY SADLER,
Commissioner of the General Land Office.

(Seal)

GENERAL LAND OFFICE, AUSTIN, TEXAS Jul 26 1961

I, JERRY SADLER, Commissioner of the General Land Office of the State of Texas, do hereby certify that on the reverse hereof is *a true and correct copy of the original of this instrument now on file in this office*[1] together with all endorsements thereon.

IN TESTIMONY WHEREOF, I, hereunto set my hand and affix the seal of said office the day and date first above written.

(s) JERRY SADLER,
Commissioner of the General Land Office.

(Seal)

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1. Emphasis added.

These Certifications taken together with Judge Ben H. Rice, Jr.'s Certificate, all filed in this case, are sufficient to authenticate this letter as an official record of the General Land Office under Rule 44 (43) F.R.C.P. S. 35 11

The defendant has admitted the genuineness of this letter and also the original of it, in its Response to the Plaintiff's Request For Admission. R. 20 - 21

IV. Act of 1897 Applies and Not the Subsequent Amended Act of 1951.

The Legislative *Act of 1897, ch. 129* providing for the reinstatement of forfeited land, at the time these contracts were made in 1910, had no five (5) year time limitation or any other time limitation, to have forfeited land reinstated, according to Mr. Justice Greenwood of the Supreme Court of Texas which in 1930 said as follows:

> "*Since 1897, our Statutes have provided:*
>
> "In any case where lands have been forfeited to the state for non-payment of interest the purchaser, or their vendees, may have their claims reinstated on their written request, by paying into the treasury the full amount of interest due on said claim up to the date of reinstatement, provided that no rights of third persons may have intervened. Acts 1897, c. 129, p. 185; 10 Gammel's Laws of Texas, p. 1239; Art. 5326, 15 Vernon's Annotated Revised Civil Statutes 1925." *Cruzan v. Walker*, 119 T. 189, 26 S. W. 2d 908, S. Ct. Tex., 1930. (Emphasis added.)

The above portion of the statute was made part of the contract and has the same citations. *Acts 1897, c. 129* which we have stated above is found in the first two lines of the contract. It is also found in a second place, called "Obligation" part of the contract. R. 47-54, 138-141

The above *Act 1897, ch. 129* was amended by the Texas Legislature in 1941 and 1951 Acts. Among other basic changes both the 1941 and 1951 Amended Acts provided as follows:

> "Such right must be exercised within five (5) years from the date of the forfeiture."

The land involved was forfeited to the State on July 21, 1947 for non-payment of interest; the forfeiting owner being D. H. Heinemann, Estate.

This plaintiff recorded his deeds in the County Clerk's Office of El Paso County, Texas, from the son and the widow, the sole heirs of the D. H. Heinemann, Estate July 14, 1952. Defendant has admitted the genuineness of these deeds. R. 20, 21, 104, 116

The Land Office has never been interested in the deeds. All it has requested was the notice of the claim as owner and the payment of all the back interest. R. 120, 121

On July 23, 1952 the Land Commissioner received the written claim of ownership together with all the back interest, with a request to reinstate forfeited land for this plaintiff. R. 120, 121

The Land Commissioner in his letter of July 24, 1952 refused to reinstate the land. Reason for his refusal was not in the statute in 1910 at the time of

making the contract. The Land Commissioner was applying the five (5) year limitation put in the amended Acts of 1941 and 1951, which was put in after the contract was made. R. 116, 118

After the Land Commissioner's second letter of September 6, 1952, with reference to the D. H. Heinemann, Estate lands,[1] the plaintiff received no further notice from the Land Office. The defendant's answer stated that the Land Commissioner granted patents to the defendant January 26, 1956.

This plaintiff for the first time on June 1, 1961 found out that the defendant had received these patents under a special Legislative Act passed in 1955, which is not published in any of the Vernon's, Revised Civil Statutes of the State of Texas. It is filed in the Secretary of the State's Office, *Senate Bill No. 295, ch. No. 278, 56th Legislature, Regular Session, 1955,* signed by the Governor on May 20, 1955 and filed for record in the Secretary of State's Office on May 23, 1955.[2]

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[1]Plaintiffs' Exhibits Nos. 33, 33A. The defendant has admitted the genuineness of this letter. R. 123, 125

[2]See Appendix No. 4 to this brief for a Certified Copy of this Act.

V. Settler-Vendees' Rights to Reinstate Their Forfeited Lands Is a Vested Right According to the Supreme Court of Texas.

The Supreme Court of Texas for over half a century has many times down to the present time held that the settler-vendees' right to reinstate their forfeited lands, is a vested right, which no subsequent statute or Act of the Land Commissioner can take away from him. Authorities will be shown later in this brief (Brief p. 16f, 30, 33).

This case is thus a controversy between the settler's vendee with their contracts and awards for lands made in 1910 from the General Land Commissioner of Texas, which specifically state in said contract that the following Acts are part of the contract itself; *ch. 129, Acts May 19, 1897*, and others. Whereas the defendant is claiming its right under awards of 1955 and patents of 1956 for the resale of the same lands.

SUMMARY OF POINTS IN ARGUMENT

FIRST POINT. There Is No Genuine Issue as to Any Material Fact and the Plaintiff Is Entitled to a Judgment as a Matter of Law Under His Motion for Summary Judgment. F.R.C.P. Rule 56.[1]

SECOND POINT. Plaintiff Substantially Complied With the Requirements of the State Statute Specified in the Contract of 1910 For the Reinstatement of the Forfeited Land.

THIRD POINT. If Plaintiff Did Legally Reinstate His Lands Or If He Did Not Do So, It Was the Duty of the Attorney General of the State of Texas to Adjudicate and Clear the Plaintiff's Claims on Record in the Land Office, Including the Contract of 1910, to the Title to These Lands Before They Could Be Offered Again For Resale by the Commissioner.

FOURTH POINT. If the Land Commissioner and His Attorneys Were Correct in Refusing Plaintiff's Reinstatement, Because the Legislative Changes in the Acts of 1941, 1951, 1955 Then These Legislative Acts All Taken Together Impair the Obligation of Contract, Insofar as They Attempt to Apply to Contracts Made Before Their Enactment, and Are Unconstitutional.

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[1]For authorities relied upon for each point herein, see index pp. i-v.

THE SPECIFICATION OF ERRORS.

I. The District Court erred in denying Plaintiff's Motion for Summary Judgment.

I-A. The Court erred in sustaining the Defendant's Motion for Summary Judgment and in dismissing the suit.

II. The Court erred in failing to recognize that Plaintiff, as a matter of law, reinstated his forfeited lands in July, 1952.

III. The Court erred in failing to recognize that the Land Commissioner (for the State of Texas) did not have the authority to place these lands on the market for resale and to issue the patents to the Defendant, until after the Attorney General of the State had adjudicated the ownership claims of this Plaintiff to these previously sold lands, actively covering a 42 year period.

IV. The Court erred in failing to recognize, that if the Land Commissioner and his attorneys were correct in refusing Plaintiff's reinstatement because of Legislative changes in the Acts of 1941, 1951 and 1957, then these Legislative Acts taken together, impair the obligation of contract, insofar as they attempt to apply to the vested rights given under the reinstatement of forfeited land statute, as construed by the Texas Courts for over a half century.

BRIEF OF THE ARGUMENT.

First Point.

There is no genuine issue of any material fact, as the Defendant has admitted all facts claimed by the Plaintiff.

This leaves only questions of law to be decided. Did the District Judge err in his legal conclusions in dismissing this suit?

This is an action where both parties are claiming title to two parcels of land totaling 620.65 acres, located in El Paso County, Texas.

Plaintiff's Complaint fulfills the Texas Statutory requirement of Trespass to Try Title.

Plaintiff claims his prior right by reason of the deeds which he obtained from the D. G. Heinemann Estate and recorded on July 14, 1952 (R. 104, 110). By reason of these deeds the Plaintiff obtained whatever right the Heinemann Estate and their predecessors in title, had in these contracts, which settlers Glenn and Kilpatrick obtained when they purchased the land from the State under the purchasing land contracts as part of their home sites on January 29, 1910 (R. 43-44, 120-121).

The big question in this suit is not whether the lands were forfeited, but whether the already forfeited lands were reinstated, as a matter of law. If so, then the original statute still provides:

> "In all cases the original obligations and penalties shall thereby become as binding as if no forfeiture had ever occurred." (R. 55-56, 59)

The already substantially performed land purchase contracts, which had been in the process of being performed by many predecessors in title, between the dates of 1910 and 1952, covered 42 years. The substantial performance was as follows: 1/40 of the principal was paid in 1910 by the settlers Glenn and Kilpatrick. Since then for over 33 1/3 years their heirs and successors have paid more interest, at 3 per cent per annum, to the State, than the total contracted purchase price of $1.50 per acre (R. 43, 67). For years, penal interest of 5 per cent on all unpaid delinquent interest was assessed (R. 61, 99). During 1910 and 1913 the settlers spent $2,850.00 in improvements on their home site lands, which included these lands (R. 46). They likewise had to live three years on the land, as their home, in order to obtain it. This was later repealed. These Certificates of Three Year Residence were filed in the Land Office and also recorded in the County Clerk's Office of El Paso County, Texas, in 1913 (R. 46, 48, 69).

In 1947 this land was forfeited for the nonpayment of interest. In July, 1952, this Plaintiff, based upon his recorded deeds, filed his applications, claiming the ownership under these land purchase contracts of 1910 and asked for reinstatement of the forfeited lands. The checks for all back interest to date were also tendered to the Land Commissioner (R. 120-123).

Plaintiff's interest payments tendered, amounted to over one-half of the value of the total purchase price of $1.50 per acre and this was in addition to the interest payments, already made by his predecessors in

title, of over the total contracted purchase price of $1.50 per acre (R. 120, 121).

The three important instruments for the Court to consider are listed above as the contract between the State and the settlers in 1910, and second, the application of the Plaintiff to reinstate the land, and third, the checks which were tendered for the payment of all back interest. Each parcel of land has a contract, application and check. As the two contracts, applications and checks are the same, it will only be necessary to look at one of each (R. 43-44, 67-68, 120, 121).

In July, 1952, no third party rights had intervened to interfere with the Plaintiff's title. The above procedure was the ordinary way these ownerships have been handled throughout the years (R. 36, 38, 43-125).

These recorded deeds had always given the vendees the right to possession of the land involved and they were considered the owners. It was this contractual right to the possession and ownership of the land which was obtained by Plaintiff, and when he recorded his deeds on July 14, 1952, this also became constructive notice to the subsequent purchaser, the Defendant, of such possession and ownership. The Plaintiff with the right to possession and ownership filed his sworn statement of such ownership and application for reinstatement of the land and tendered all back interest (R. 120, 121).

This Plaintiff did everything any reasonable man could do, and was legally required to do, to reinstate his forfeited land purchase contracts made in 1910. There was no further legal duty on this Plaintiff to do

anything further. Now he has brought this suit to get the subsequent purchaser with notice off his land.

Second Point.

Plaintiff and his predecessor in title, subsequently complied with all the requirements of the State Statutes, specified in the land purchase installment contracts of 1910, for the reinstatement of these forfeited lands (R. 120-122). It is well settled in Texas that the reinstatement of forfeited land statute was not passed for the benefit of the State, but for the benefit of the settlers who purchased the land installment contracts and their successors. *Gulf Production Co.* v. *State*, 98 Tex. 237, 231 S. W. 124; 127-128, 131-134; *Cruzan* v. *Walker*, 119 Tex. 189, 26 S. W. 2d 908-909, S. Ct. Tex., 1930; *Anderson, et al.* v. *Neighbors*, 94 Tex. 236, 59 S. W. 543, 544, 546, S. Ct. Tex., 1900; *Freeis* v. *Walker*, 120 Tex. 291, 26 S. W. 2d 627, 629, 630 (1930).

It is well settled in Texas that it is not necessary to have the Land Commissioner for State of Texas, approve the request for reinstatement of forfeited lands. All that is required is to make the request and tender all the back interest, provided that no rights of third persons may have intervened. *Davis* v. *Yates*, 63 C. A. 6, 133 S. W. 281, 284-286, Writ of Error Denied (1911). All these requirements were admitted to have been complied with. Over 30 years after substantial performance of these contracts, the State Legislature in 1941 and 1951 added amendments in the same paragraph, to the reinstatement of for-

feited lands Statute (B. 59), provided for a five year limitation statute, and leaving unchanged the requirement, "Provided that no rights of third persons may have intervened."

It is well settled in Texas for over half a century that the right, to the reinstatement of forfeited lands under the Statute has been a vested right, which could not be taken away by Legislative enactment of the State, where no third party had intervened at that time. *Gulf Production Co.* v. *State,* 98 Tex. 237, 231 S. W. 124, 127-128, 131-134; *Cruzan* v. *Walker,* 119 Tex. 189, 26 S. W. 2d 908-909, S. Ct. Tex., 1930; *Anderson, et al.* v. *Neighbors,* 94 Tex. 236, 59 S. W. 543, 544, 546, S. Ct. Tex., 1900; *Davis V. Yates,* 63 C. A. 6, 133 S. W. 281, 284-286, Writ of Error Denied (1911).

In July, 1952 at the time Plaintiff requested reinstatement, the Land Commissioner had no standing to deny reinstatement because, there were no third party intervening rights present; neither did this Defendant have any standing to have Plaintiff's request denied because it had no intervening rights at that date, and later it became a subsequent purchaser with constructive notice.

Third Point.

The Land Commissioner did not have authority to place these lands on the market for resale and issue the patents to the Defendant until after the Attorney General of the State had adjudicated the claims of the Plaintiff to these lands. *Southern Pine Lumber Co.* v. *Consolidated Louisiana Co.,* 217 F. 719, 723-

725, C .A. 5, 1914; *Juencke* v. *Terrell,* 98 Tex. 237, 82 S. W. 1025, 1026, S. Ct. 1904.

The Texas State Constitution, Art. 14, Section 2, provides that the State shall issue patents only upon vacant and unappropriated public domain, "and not upon land titled or equitably owned under the color of title from the sovereignty of the State, evidence of the appropriation of which is on the County Records or in the General Land Office." The Plaintiff's claims of ownership were both "on the County Records" (R. 104, 110) and "in the General Land Office" (R. 120, 121, 116-119. Also see, for record covering over the 45 year period in both offices R. 43-125).

The Affidavits claiming ownership were included in the applications for reinstatement of the forfeited lands (R. 120, 121) and acknowledged in the letter from the Land Commissioner, dated July 24, 1952 (R. 116-119).

Fourth Point.

If the Land Commissioner and his attorneys were correct in refusing Plaintiff's reinstatement because of Legislative changes in the Acts of 1941, 1951, and 1955, then these Legislative Acts taken together impair the obligation of contract insofar as they attempt to apply to these contracts made before their enactment and are therefore unconstitutional. *Drumwright, et al.,* v. *Texas Sugarland Co., et al.,* 16 F. 2d 657, 658, C. A. 5, 1927, Cert. denied, 274 U. S. 749; *Frank* v. *The State Bank and Trust Co.,* Tex. Com. App. 1924 (Entered as judgment of Supreme Court, Tex.), 263 S. W. 255, 256, 258.

It is well settled in Texas that the State cannot itself refuse reinstatement of forfeited lands unless there are third party rights, and this right is a vested right of the purchaser and its vendees and their successors in title. *Gulf Production Co.* v. *State,* 98 Tex. 237, 231 S. W. 131-132, 134; *Hooks* v. *Kirby,* 58 C. A. 335, 124 S. W. 156, Civ. App. Tex., Writ of Error Denied. This principle was well stated as follows: "* * * this right became vested and cannot be impaired by subsequent legislation." *Cruzan* v. *Walker,* 119 Tex. 189, 26 S. W. 2d 908, 909, S. Ct. Tex., 1930; *Anderson, et al.* v. *Neighbors,* 94 Tex. 236, 59 S. W. 543, 544, 545, S. Ct. Tex. 1900.

Purchasers contracts and awards for public lands by the State, as part of their home sites, which were in the process of execution and interest paid on them for over 30 years and substantially performed, were too far executed to permit subsequent legislation, giving the State these valuable lands by adding additional limitations not in the statutes and conflicting with vested rights, which were part of these contracts and awards at the time they were made in 1910. *Pennoyer* v. *McConnaughty,* 140 U. S. 1, 9, 10, 24-25.

The history of the Legislative Act of 1897, (B. 55, 56) being the Act under which the 1910 contracts were made, is clearly shown in *Freels* v. *Walker,* 120 Tex. 291, 26 S. W. 2d 627, 629, 630 (1930), Com. of App., Rehearing denied. The State cannot modify vested rights, except by mutual consent of any provision of a pre-existing contract into which it may have entered. *New Jersey* v. *Wilson;* 7 Cranch 164, 167; *Sovereign*

Camp v. *Wilentz*, 23 F. Supp. 23, appeal dis., 306 U. S. 573, D.C.N.J., 1938; *Columbia Railroad Company* v. *South Carolina*, 261 U. S. 236, 248, 251 (1922). The State does not have power to pass amendments, under the pretense of changing the remedy, which undertakes to compel the party to accept something different in place of the vested rights for which he contracted. *McCracken* v. *Hayward*, 2 How. 608.

On July 23, 1952, after these vested rights of the predecessors in title had been exercised by this Plaintiff, these previously forfeited lands became reinstated, as a matter of law, no matter what the Land Commissioner and the State of Texas or anyone else did after that. No matter if the five-year limitation statute had been added by amendment or any other provision, it could not prevail over what the Texas Courts have, for over half a century, held to be present existing vested rights.

The equitable rights of this Plaintiff here, under these 1910 contracts, are the same as if his predecessors in title, settlers Glenn and Kilpatrick were standing before this Court crying for relief in saving their homes built on these lands over 42 years ago. Many other heirs and vendees of settlers have these unmatured land purchasing contracts still existing.

We respectfully submit, that the District Court Judgment for the Defendant and the sustaining of the Defendant's Motion for Summary Judgment, should be reversed and the Plaintiff's Motion for Summary Judgment should be sustained, and the Judgment should be for the Plaintiff.

ARGUMENT.

FIRST POINT.

There Is No Genuine Issue as to Any Material Fact and the Plaintiff Is Entitled to a Judgment as a Matter of Law Under His Motion For Summary Judgment. F.R.C.P. Rule 56.

The request for Admissions[1] which composed of the plaintiff's Exhibits No. 1-33A show that all this is documentary and official records. These certified copies of official records come from the General Land Office for the State of Texas or the County Clerk's Office, El Paso County, Texas. All are certified copies of official records or adequately referred to in certified copies. R. 43-125

Defendant in its Response to plaintiff's Request for Admission, "Admits the genuineness of all documents and instruments marked Exhibits 1 through 33A," except, Exhibits 32B to 32H, both inclusive. R. 20

The seven above Exhibits, not admitted and excepted by the defendant, are the 3 applications of the plaintiff to reinstate forfeited lands and the 4 checks "for interest to reinstate" such lands.

The lands above are the lands plaintiff obtained in his recorded deeds of July 14, 1952 from the D. H. Heinemann, Estate. Plaintiff's Exhibit Nos. 28, 30. R. 104

All seven are acknowledged in the Certified Copy of the letter of July 24, 1952 from the General Land Commissioner, when he returned them from his General Land Office on that date. R. 116, 118

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[1] 28 U.S.C.A. Rule 36. F.R.C.P.

The defendant has admitted the genuineness of this letter which acknowledged the receipt of each of the 7 instruments and returned them enclosed with the letter. R. 2[illegible]

Each of the 7 instruments has a number stamped upon it which was stamped upon it by the General Land Commissioner's Office at the time it was received there, which was done because of a law requiring same to be done. R. 120, 121, 122

In addition to this number on each, the 3 applications also has an additional stamp put on them upon arrival at the General Land Office. The 2 applications involved are as follows:

"RECEIVED
JUL 23, 1952
GENERAL LAND OFFICE."

The small numbers stamped upon each application has the same number stamped in the upper right-hand corner of the corresponding bank checks. The stamped number 43325 on the application to reinstate forfeited lands of N 2 of Survey 240 was also stamped on the corresponding check for interest of $430.11 due to reinstate that piece of land.

The plaintiff's Exhibit No. 32D, Application to Reinstate Survey 235 has the General Land Office stamp No. 43326 and the corresponding bank check for $251.02 interst to reinstate Survey 235 has the corresponding No. 43326 stamped on it in the upper right-hand corner.

These 7 originals are in the United States District Court Clerk's safe. Also the original letter of July 24, 1952, the Land Commissioner sent in returning them.

The Certified Copy of the letter of July 24, 1952 from the General Land Commissioner, of which defendant admits the genuineness, shows that all these 7 were delivered into the custody of the General Land Commissioner and the General Land Office. Whether he kept them or not they were deemed, as a matter of law, to have been filed in the General Land Office. The Supreme Court of Texas has so ruled in a similar case. *Snider* v. *Methvin,* 60 Tex. 487, 494, S. Ct. Tex. (No S. W. citation, as it was before the S. W. Reporter started.); *Holman* v. *Chevallier,* 14 Tex. 337, 339, S. Ct. Tex. (No S. W. Reporter cited.)

The above Snider case is cited for this authority in Note 1, under *Article 5261,* Vernon's Civil Statutes of the State of Texas, Annotated, Revision of 1925.

Articles 5261, 5262, 5263, 5265, required the General Land Office Commissioner to keep and file all papers pertaining to land title concerning the state.

The title of the lands depends upon whether these forfeited lands were reinstated, as a matter of law, in 1952 with the General Land Office. Plaintiff applied for such reinstatement and sent all interest due to the Land Commissioner. The Land Commissioner replied by letter that he received them too late to permit reinstatement under the law.

Plaintiff contends that the Land Commissioner, without authority of law, used a portion of the statute

not in the law at the time the contract was made, but which was added by Legislative Amendment later.

The law enforced and set out in the contract itself, at the time the contract was made with the state, had no time limit in it.

The Legislative amendment later provided additional basic changes, including the right to reinstate, which must be exercised within five (5) years from date of forfeiture.

In the *Gulf Production Company* v. *State,* 98 Tex. 237, 231 S. W. 127, Civ. App. 1921, error refused, *supra,* it is said at p. 126 S. W. as follows:

> "And there was no conflict in the parole evidence, which was explanatory of, and forfeited the effect of, the documentary evidence, thus in effect eliminating all issues of fact, so that the only questions arising in the case are questions of law to be applied to undisputed facts."

This leaves only questions of law to be decided by the Court.

SECOND POINT.

Plaintiff Substantially Complied With the Requirements of the State Statute Specified in the Contracts of 1910 For the Reinstatement of the Forfeited Lands.

The statute for reinstatement of forfeited lands for non-payment of interest has been the same in Texas from 1910 to 1941. It had no five (5) year limitation placed on the forfeited land owner, nor did it have any time limitation period in it. *Cruzan* v. *Walker, supra.*

During the 31 year period this portion of the statute has been clearly defined by the Supreme Court of Texas and the Court of Civil Appeals of Texas.

The original contracts were made with settlers W. H. Glenn and John B. Kilpatrick, on January 29, 1910, plaintiff's Exhibits Nos. 1, 16, in the first two lines of these contracts it provides in part as follows:

> "I hereby apply to purchase under the provisions of * * * Ch. 129, Act of May 19, 1897 * * * The following land situated in El Paso County * * *." R. 67-68, 133-141

When the state awarded these lands on April 30, 1910 to the settlers it made the above Act part of the contract. R. 141, 68

This is the Act plaintiff had to comply with when he became vendee of the D. H. Heinemann, Estate which was the last forfeited owner on the Land Office record. R. 63, 101

What did the statute require? It required:

1. That no third party's rights had intervened before the application to reinstate was received.

2. That all back interest be paid to the date of reinstatement. B 55

These two requirements were fulfilled. To this date these two have not been questioned.

It had nothing in it requiring any time limit whatsoever.

The plaintiff's Exhibit Nos. 32, 32A, 32B, 32C, 32D, 32E, show that the above was substantially complied

with. These Exhibits are the applications made by plaintiff and checks sent for interest and the letter from the Commissioner, dated July 24, 1952, denying reinstatement of the forfeited lands. B. 116-121

The Supreme Court of Texas has repeatedly stated that the above substantially complies with this Act. Such authorities will be stated subsequently.

What right did the forfeited owner have between the time of forfeiture, July 21, 1947 and to the date of reinstatement, July 23, 1952? When plaintiff complied with the two above requirements this forfeited land, as a mater of law, became reinstated. B. 54

Nothing could the Land Commissioner do or not do, could or can, keep this land from being reinstated on July 23, 1952. B. 54

During the period between July 21, 1947 and July 23, 1952 while it was forfeited, the forfeited owner had a vested right to reinstate under *ch. 129, Act of May 19, 1897.* B 28

The Supreme Court of Texas has repeatedly held that during this period this was a vested right which could not be defeated except by some third party right intervening, before the reinstatement was complied with. This did not happen. Likewise the state could not be the third party referred to in the statute. The state was the first party and the vendee was the second party, so the state could not be the third party.

Furthermore the Court has held that this forfeiture and reinstatement statute should be liberally construed in favor of the parties for whom it was passed to help, namely the purchasers, heirs and vendees of the land

contracts and was not passed for the benefit of the State.

The statute referred to in the contract of 1910 as *Ch. 129, Act of May 19, 1897* covers the reinstatement of forfeited lands at page 185. It is the same Act which was in force on the same subject up until the amendment of 1941.

The Supreme Court of Texas, in the case of *Cruzan v. Walker,* 119 Tex. 189, S. Ct. 1930, 26 S. W. 2d 908, 909, said that the same statute on reinstatement of forfeited lands, had been in existence since 1897, as follows:

> "*Since 1897, our statutes have provided:* 'In any case where lands have been forfeited to the state for the non-payment of interest, the purchasers, or their vendees, may have their claims reinstated on their written request, by paying into the treasury the full amount of interest due on such claim up to the date of reinstatement, provided that no right of third persons may have intervened.' Acts 1897 c. 129, p. 185; 10 Gammel's Laws of Texas, p. 1239; Article 5326, 15 Vernon's Annotated Revised Civil Statutes 1925." (Emphasis added.)

It will be noted that this opinion was in 1930 and this Act was still the same Act which was in the contract of 1910 and it has the same citation namely *Acts 1897 ch. 129, p. 185.* However, it will be noted that the additional citation was added because different publishing companies came on during that period of time and published under different Section numbers, but the statute remained the same as set out by the

Judge and has been the same since 1897 to 1930, and remained the same for several years after this opinion up to 1941 when the amendment was made.

The Court went on to say on p. 909:

> "Before the statute was four (4) years old, the Supreme Court announced that the history and purpose of its enactment required that it be interpreted with the utmost liberality in favor of the former owner seeking reinstatement of his purchase. In so construing the statute, the Court declared that in order for an intervening right to defeat reinstatement it must be a vested right enforceable in the Court proceedings. *Anderson* v. *Neighbors*, 94 Texas 240-242, 59 S. W. 543." * * *
>
> "We think rather, that the Legislature had in mind such right of third parties as constitute a present existing bar to reinstatement—an existing, vested right enforceable at the time by the party owning such right. This provision was not inserted for the benefit of the State of Texas, but for the benefit of third parties in whose favor such intervening rights existed; and, when there are no third parties who can lawfully complain of the reinstatement, *the state cannot be heard to do so.*" (Emphasis added.)

Before we leave the quotation of this case we wish to quote it further pertaining to another case which we expect to quote following this case, which is one of the leading cases on this subject in the Texas Courts. However, it is a Civil Appeals case but the Supreme Court in this case said pertaining to the leading case as follows:

"The very question raised by realtor was presented to the Supreme Court, under briefs of imminent counsel, on application for writ of error in the case of *Gulf Production Company* v. *State* (Tex. Civ. App.), 231 S. W. 124, 132. In refusing the application on March 1, 1922 (25 Texas and S. W. Digest, p. 28446) the Court necessarily approved the following portion of the opinion of the Court of Appeals. * * *"

In *Gulf Production Company, et al.* v. *State,* 98 Tex. 237, 239, Civ. App. 1921, error refused, 231 S. W. 124, 131-132, 135, the facts in this case are as follows: The State of Texas brought this suit to cancel the sale of public land. A man by the name of Kidd had the County Clerk make up his application to purchase and the Clerk sent the application and money in to the General Land Office for Kidd. The Clerk put the bid in the land at $1.50 per acre thinking that it was agricultural land only. Later it was classified as mineral and agricultural land. On this there is much proof, however after taking quite a lot of proof the Court narrowed it down to documentary evidence very similar to the kind which is in the case at bar.

Kidd forfeited the land for non-payment of interest, then gave a quit claim deed for his interest in the purchase contract without settlement. There were intervening parties trying to obtain the land on application and did obtain it on application. Then the latter party abandoned the land granted to him on his application because he did not stay on the land the required three year period; after all of this happened the grantee from Kidd had the land reinstated.

Question: Did the grantee of Kidd have the right to reinstate the land? It had become valuable for oil production, estimated value at $8,000,000., 160 acres was involved.

The Lower Court held that the vendee of Kidd could not reinstate under these conditions but when the case came on to the Court of Civil Appeals it reversed the Lower Court and remanded the case, ruling on several points of law including quit claims, reinstatement of forfeited land, forfeiture rights and the lack of the power of the General Land Commissioner to use any discretion in applying the statute to reinstate where no third parties had intervened.

The Court said, "We hold, that the sale to Kidd of the land in controversy was regularly made and is valid * * *." It said at p. 131, S. W.:

> "It was right and just that those who had settled upon and improved the State's lands in response to invitation of the State, and who had endured the hardship incident to such settlement, and the privations instant to such improvement, should be given an opportunity to retrieve their lands when forfeited by reason of temporary misfortune and the consequent inability to meet their payments in strict compliance with their obligation. Forfeitures by statute or contract are not favored. They must be viewed with the cold and literal scrutiny, that the injury wrought may be held to a minimum. On the other hand statutes or contracts designed to relieve from the rigors of forfeitry are looked upon warmly and construed liberally, so as to afford the maximum relief. And this reciprocal rule applies as well to the great

> State of Texas as to the humblest citizen. So, the provisions of the statute for the forfeiture of sales, and for the reinstatement of such sales, should be tested by the rule in question."

Then the Court goes on to quote the same statute as was quoted later in the *Cruzan* v. *Walker, supra,* except it adds the last sentence which is also part of the statute, which is as follows:

> "In all such cases, the original obligations and penalties shall thereby become as binding as if no forfeiture had ever occurred."

Then the Court goes on:

> "It will be observed that there are two conditions upon which reinstatement may be had: First, the payment of the full amount of interest due by the purchaser up to the date of reinstatement; and, second, the absence of intervening rights of third persons. Appellees seek to inject here a third condition, to wit, that the classification of the land has not been changed since the original purchase was made.
>
> "* * * If the Legislature had intended to provide that the reinstatement must be subject to or defeated by an arbitrary change by the Land Commissioner of the classification and appraisement of the land, it should and would have affirmatively and definitely said so in terms. The provisions for reinstatement were in effect when Kidd purchased the land, and were embraced in the contract between the state and Kidd when the latter purchased, and neither Kidd nor the state could thereafter arbitrarily and without the consent of the other write into the contract any provisions or condition, varying, restricting, or en-

larging the terms thereof. If the state could by act of its Legislature ingraft this onerous condition onto the contract, then by the same license it could by like means increase the original purchase price of the land, or the rate of interest or terms of payment thereon. The payment of the back interest was the only condition so far as the state was concerned, required of Kidd in procuring the reinstatement of his purchase, and the subsequent act of the Commissioner in reclassifying and reappraising the land could not serve to create an additional condition. *Anderson* v. *Neighbors*, 94 Tex. 240, 59 S. W. 543; *Hooks* v. *Kirby*, 58 Tex. Civ. App. 335, 124 S. W. 156 (Writ of error denied); *Wing* v. *Dunn*, 60 Tex. Civ. App. 16, 127 S. W. 1101 (Writ of error denied (Sup) 128 S. W. 108); *Jumbo Company* v. *Bacon*, 79 Tex. 5, 14 S. W. 840; *Bates* v. *Bratton*, 96 Tex. 279, 72 S. W. 157; *Houston Oil Company* v. *McGrew*, 107 Tex. 220, 176 S. W. 45. In *Hooks* v. *Kirby*, *supra*, this principle was well stated as follows:

"* * * this right became vested and cannot be impaired by subsequent Legislation."

The Court in the *Gulf Producing* case, *supra*, goes on to answer the contention that the appellee who tried to inject several other statutes into the issue at this time and the Court said at p. 132 S. W. as follows:

"The most obvious fallacy in this contention is that both the provisions relied on relate exclusively to resale of lands. They do not purport, directly, or indirectly to relate to the reinstatement of forfeited sales. This is obviously from the plain language of these provisions that appellees' contention approaches the frivolous. The provision in Art. 5423 is a part of the forfeiture

clause, relating solely to the resale, and is wholly disconnected from and does not in any respect whatever refer or purport to refer, to the provisions of reinstatement. The forfeiture clause in Art. 5423 provides for three steps (a) forfeiture, (b) revision to the school fund, and (c) resale. The clause for reinstatement, which is separate and apart from the forfeiture clause, prescribes two conditions upon which the reinstatement may be had, (a) payment of all back interest, and (b) absence of intervening rights of third party. There is no condition there that the reinstatement cannot occur in the face of a reclassification or reappraisement of the land. Moreover, the clause affirmatively provides that 'in all such cases' of reinstatement 'the original obligation and penalty shall thereby become as binding as if no forfeiture had ever occurred.'"

The Court goes on to explain why the sundry and various other public land statutes which the appellee tried to inject into this case does not apply to the reinstatement of forfeited lands and continues to quote and say:

"'It will be seen from its language that no stretch of the construction can this provision be made to refer to the reinstatement of forfeited sale.'"

The Court goes on to say on p. 133 of S. W. as follows:

"We think, rather, that the Legislature had in mind such rights of third parties as construed at present existing bar to reinstatement—and existing, vested right, enforceable at the time by the party owning such right. This provision was not

inserted for the benefit of the State of Texas, but for the benefit of third parties in whose favor such intervening rights existed; and, when there are no such third parties who can lawfully complain of the reinstatement, *the state cannot be heard to do so.*" (Emphasis added.)

The Court goes on to say at p. 134 that the right Kidd had could not be taken away from him as it was a vested right.

"And that was a vested right which no statute or act of the Land Commissioner could take away from him. Moreover, the statute (Art. 5423) expressly gives that right to 'the original purchaser or their vendees.' This right may be momentarily obscured by a shadow, such as the Griffin transaction; are entirely obliterated by complete and permanent resale, but it is there, nevertheless, and and is written in clear and express language into the contract between the state and the original purchaser. It is just as clear and definite and tangible as is the right, given in the same contract, to continue the title in force by paying the interest on the 1st of November each year.

* * * * The right to reinstate the Kidd sale was a vested right, and could be defeated only by failure to pay the accrued interest on the land, or by enforceable intervening rights of third parties. No representations of Lewis, whether true or false, could affect that right. He was, or was not entitled to the reinstatement, and nothing he could say would enlarge or lessen the authority of the Land Commissioner."

Besides the *Cruzan* v. *Walker, supra,* quoting extensively from the *Gulf Production Company* v. *State,*

supra, in above case in 1930, also the case of *Freels* v. *Walker* in 1930 to be later quoted and *State* v. *Walden* in 1959, later to be quoted, cited with approval the *Gulf Production* case.

It will be noted that the reinstatement of forfeited land statutes which was passed in 1897, was Art. 4218f later became *Art. 5423* and later in 1925 in the Revised Civil Statutes it became *Art. 5326* but the wording of the Statute was the same since 1897 to 1941.

It is held that when the Land Commissioner tries to set a reinstatement aside, his acts in attempting to do so are void. The Court held same in *Freels* v. *Walker,* 120 Tex. 291, 26 S. W. 2d 627 (1930), the Court said at pp. 629, 630:

> "Another salutary rule of construction is that where a statute is designed to relieve from the rigors of forfeiture, it should be most liberally construed to accomplish that purpose. *Gulf Production Company* v. *State* (Tex. Civ. App.), 231 S. W. 124. * * *
>
> "The reinstatement of the land in question by the Commissioner on August 29, 1924 being prior to the intervening right acquired by the respondent Bowden, was in all things valid, here the Commissioner was without authority to set such reinstatement aside, and his attempt on September 3, 1926, to do so was void."

In 1959 the Texas Civil Appeals Court quoted with approval the 1921 case of *Gulf Production Co.* v. *State, supra,* in *State* v. *Walden,* Civ. App. Tex. 1959, 325 S. W. 2d 705, 711, the Court at p. 711 said as follows:

"It is our duty to construe these laws so as to alleviate against the rigors of forfeiture, for the laws abhors a forfeiture. *Board of Insurance Commissioners of Texas* v. *Great Southern Life Insurance Company,* 150 Tex. 258, 239 S. W. 2d 802, 809; *Freels* v. *Walker,* 120 Tex. 291, 26 S. W. 2d 627; *Oklahoma Tool and Supply Company* v. *Daniels,* Tex. Com. App. 290 S. W. 727. And in *Gulf Production Co.* v. *State,* Tex. Civ. App., 231 S. W. 124, at p. 131 it is said: 'Forfeitures by statute or contract are not favored. They must be viewed with a cold and literal scrutiny, that the injury wrought may be held to a minimum.' The fact that the sale of land was made by quit claim deed, instead of waranty deed has no significance. * * *"

Plaintiff likewise substantially complied with the Act of 1951 in the reinstatement of forfeited land. *Anderson, et al.* v. *Neighbors,* 59 S. W. 543, 544, 545, S. Ct. Tex., 1900. The last day of the exercising of the five (5) years was up on July 21, 1952. The letter of the Commissioner admits a telephone call by the plaintiff on that date about reinstatement of the lands. He further acknowledges that he received within request to reinstate the forfeited lands and payments. Also acknowledges that he was returning the $1,158.11 check which was in addition to the other payment for more than the amount due the Land Office. The stamp on the ~~check~~ application back showed he received July 19, 1952, two days before his claim of the 5 years was up. (See original)

It seems that a liberal construction of the exercised requirement was substantially complied with.

In *Anderson, et al.* v. *Neighbors, supra,* the Supreme Court of Texas said p. 545:

> "The language of the law is broad enough to admit the construction that the Legislature intended that the Commissioner, upon receiving notice of the desire of the purchaser to reinstate the forfeited contract, should allow to such applicant a reasonable time within which to ascertain the amount due and to make payment * * *."

At p. 543:

> "The Legislature, by the proviso 'That no rights of third persons may have intervened' intended to expressly give the protection which the Constitution afforded to vested rights."

This last provision on third persons rights is still in the 1951 Act. The State cannot be the third party and the Land Commissioner in his letter acted without authority in refusing to reinstate the lands. As a matter of law plaintiff's lands were reinstated under the 1951 Amendment as well as under the 1897 Act.

As it was said in *Cruzan* v. *Walker, supra:*

> "* * * When there are no third parties who can lawfully complain of the reinstatement, the state cannot be heard to do so."

The state was not representing a third party here as there was no such third party present, nor could defendant claim to be the third party because it was over three years later that defendant came along. Defendant also had constructive notice of plaintiff's deeds recorded in the County Clerk's Office over 3 years before.

According to the record in this case there was no lawful objection to the reinstatement of plaintiff's forfeited lands in July, 1952 under any of the Acts of 1941, 1951, 1897. Then, as a matter of law, it was deemed to have been reinstated. The Land Commissioner acted without authority of law and could not after plaintiff's reinstatement, resell these lands to the defendant or anyone else, under patents or even under color of title.

THIRD POINT.

The Land Commissioner Did Not Have the Authority to Place These Lands on the Market For Resale and Issue the Patents to the Defendant, Until After the Attorney General of the State Had Adjudicated the Claims of the Plaintiff to These Lands.

Question here is to ascertain whether the Land Commissioner had authority to place the land upon the market and issue patent to the defendant.

The patents obtained by defendant were upon lands not legally upon the market for sale by the Land Commissioner.

The Land Office has many documents and official records pertaining to the involved land, many of which are plaintiff's Exhibits filed in this case. R 43 125

Two were contracts for the sale of these lands issued 45 years before defendant made its application to buy these lands which were already sold. R 43-44 61-68

Down through the years several heirs and vendees have been paying interest on these contracts. R 91-96

As stated before during hard times settlers and vendees of settlers sometime had trouble paying the interest. It happened quite frequently that it became necessary for the forfeited owners to wait for long periods of time before reinstating their forfeited land.

Between 1910 and 1941 the Act providing for reinstatement of forfeited lands had no time limit on the privilege to reinstate. It could be reinstated at any time "provided that no rights of third persons may have intervened."

During one of these periods after the land had been forfeited for several years the land forfeited owner was the D. H. Heinemann, Estate. On one hot July day, July 23, 1952 there arrived at the Land Office sworn applications on forms, formerly sent plaintiff by the Land Office, to be used for these purposes stating that this plaintiff was the owner of these forfeited lands and "affiant hereby tenders all delinquent interest and requests that these tracts be reinstated" and sent the checks to cover same. This oath was made before a deputy County Clerk and has the County Court seal upon it. R 120, 121

The General Land Office placed their stamps on these applications:

"RECEIVED
JUL 23, 1952
GENERAL LAND OFFICE."

and gave each application a number and stamped it on the application and then put the same corresponding number on the check for interest for that particular

application, and placing that little number up in the right hand corner of the check.

The next day the Land Commissioner wrote his letter of July 24, 1952 stating he was returning all applications and checks because they were not exercised within the five (5) year period. He thus applied the 1941 and 1951 amendments instead of the *Act of 1897* which had no five (5) year time limitation or any other time limitation in it. R. 116-119

Possession by the General Land Office Commissioner, himself, of these applications and checks caused them to become official records of the General Land Office; they were deemed by law to have been filed in his office, the same as if he had kept them. *Snider* v. *Methvin*, 60 Tex. 487, 494, S. Ct. Tex. (No S. W. cited); *Holman* v. *Chevallier*, 14 Tex. 337, 339, S. Ct. Tex. (No S. W. cited).

Whether the above records are by law deemed to have been filed or not, the letter the Land Commissioner wrote July 24, 1952 confirmed that this plaintiff was claiming these lands and was tendering payments for back interest. R. 116-119

A copy of this letter has remained filed as a part of his official records in his office. A certified copy of it is plaintiff's Exhibit No. 32. As stated before, defendant has admitted the genuineness of this official record. It makes no difference what file in the Land Office it came from. It refers to 3 files and 3 pieces of land. R. 116-119

In 1900 the State Legislature passed an Act which remained unchanged until 1939 and now is known as

Art. 5420. (5468) Of Vernon's Civil Statutes of the State of Texas, Annotated. Acts 1900, p. 29; Acts 1939, 46th Leg. p. 464, Sec. 1.

The early *Acts of Feb. 23, 1900,*[1] *Sec., 8,* See Session Acts 1900, First Called Session p. 29 at pp. 33-34, which was in force in 1910, at the time of the making of this contract, provided when any of the public lands, or any lands of the state are claimed adversely to the state, it shall be the duty of the Attorney General to institute suit therefor, etc. The 1900 Act, which applies in this case is stronger than the present *Act of 1939, Art. 5420.* The 1900 Act is clearer as to the duty of the Attorney General in case of claims adverse to the state.

According to Mr. Chief Justice Gaines of the Supreme Court of Texas, in the *Juencke* v. *Terrell,* 98 Tex. 237, 82 S. W. 1025, 1026, S. Ct. Tex. 1904, in quoting the 1900 Act in force at the time this contract was made as follows:

> * * * we think that the purpose of the Legislature with reference to them is shown by the eighth section of the Act. That section in part is as follows: 'When any of the lands described in this act, or any of the other public lands of the state held or owned by any fund, or any land in which this state, or any such funds have an interest, are held, occupied or claimed by any person or association or corporation, adversely to the state, or to such fund, it shall be the duty of the Attorney General to institute suit therefor,' etc. From this we think it is to be inferred that the policy of the Legislature in reference to lands

[1]Appendix No. 5.

which were claimed by third parties, was first to establish its title before putting them upon the market for sale, and that it was not intended that they should be sold until the controversy between the state and the claimant had been adjudicated. The present constitution contains this provision: 'All genuine land certificates heretofore or hereafter issued shall be * * * patented only upon vacant and unappropriated public domain, *and not upon any land titled or actually owned under the color of title from the sovereignty of the state, evidence of the appropriation of which is on the County Records or in the General Land Office.*' * * * Const. Art. 14, Sec. 2." (Emphasis added.)

This plaintiff had his claims in both the County Records and in the General Land Office.

In a trespass to try title case the Circuit Court for the Fifth Circuit in 1914 had before it a question of the Statute in force in 1910 as above stated with reference to the duty of the Attorney General under the appropriate statute and above mentioned portion of the Texas Constitution.

The facts were, that in the District Court the plaintiff, Consolidated Louisiana Company exhibited a patent from the Land Commissioner and the defendant claimed what the plaintiff is claiming here, claiming that the Land Commissioner had no authority to place the land upon the market until the Attorney General had adjudicated the prior claim to the land. These instructions were denied by the District Court and the Court of Appeals said in reversing the District Court in the *Southern Pine Lumber Company* v. *Consoli-*

dated Louisiana Company, 217 Fed. 719, 723-725, C. A. 5th, 1914:

> "In 1904 a similar question was passed upon by the Supreme Court of Texas in *Juencke* v. *Terrell, Commissioner*, 98 Tex. 237, 239, 82 S. W. 1025, 1926, in which was construed Section 6 of the Act of 1900. The reasoning of Mr. Chief Justice Gaines applied with peculiar force to the present case, and the opinion is inserted in its entirety:"

We will not undertake to quote the entire opinion as quoted by the Court, however we will quote excerpts from this Court of Appeals for Fifth Circuit, opinion, which are as follows:

> "We are firmly impressed with the conviction that it was the intention of the Legislature, as manifested by the Act to which reference has been made, to reserve from sale lands claimed adversely to the state and to the school fund in good faith under the Spanish or Mexican Grants 'until the controversy between the state and the claimants has been adjudicated' in favor of the state. In the absence of such adjudication the lands could not be legally placed upon the market for sale; and it follows that the act of the Commissioner in selling the land in question to Stevenson was against the law, and hence without validity.
>
> "We are unable to give our assent to the suggestion, made by the Consolidated Company, that the Legislature intended, either by the Act of 1905, or by any subsequent Legislation, to change or in any manner to modify the rule announced in the *Juencke* v. *Terrell*.
>
> "It is further stated by counsel in their brief that the question here involved was determined in favor of the Consolidated Company by the Attor-

ney General and the Land Commissioner, and that the practical construction of those two officials is of great weight, and should be so regarded by the United States Court in construing a statute.

"Having reached the conclusion that the title of the Consolidated Company is without validity, and hence that that company must fail in the suit. * * *"

The Fifth Circuit quoted the entire opinion of the leading Texas case on this subject namely *Juencke* v. *Terrell, supra.* As stated before, this case was decided in 1904. The Fifth Circuit case was decided in 1914. The *Juencke* v. *Terrell, supra,* has been quoted extensively and cited down through the years periodically to the present time in cases in 1920, 1932, in 1943 and in 1960.

In 1920 the case of *Fitzgerald* v. *Robison,* 110 Tex. 469, 220 S. W. 768, 769, the Court said as follows:

"The Commissioner is not a judicial officer. It is not his function to annul grants of land formerly made by the state, and because so made, entitled to be respected until set aside by appropriate judicial proceedings. A patent to land can only be attacked by the state or someone invested with a right prior to the patent.

"If the particular land had been wrongfully patented and it is rightfully a part of the public domain, the remedy of the State is on action in the District Court prosecuted by the Attorney General. Article 5468." (Now Art. 5420.)

The other case in 1932 which cited and quoted extensively the duty of the Attorney General and the

Constitution of the State of Texas as set out in the *Juencke* v. *Terrell, supra,* was *State* v. *Bradford,* 121 Tex. 515, S. Ct., 50 S. W. 2d 1065, 1079, the Supreme Court said:

> "To annul patents and *awards* is not a ministerial duty, and under the law no such duty in this respect rests upon the Land Commissioner. *This requires the exercise of judicial authority.* Nor has the Land Commissioner the power to permit others to acquire rights on the land covered by the patents and *awards* regularly issued by the proper authority, respecting the state, until the differences, if any, existing between the state and the patentees and the *awardees and their assignees,* have been adjusted or adjudicated." (Emphasis added.)

The *Juencke* v. *Terrell, supra,* was again quoted in 1943 in *Davis* v. *Morley,* 169 S. W. 2d 561, 564-565, Civ. App. Tex. The Court said at p. 565 S. W.:

> "It has never been regarded as the ministerial duty of the Commissioner of the General Land Office to annul patents and awards.
>
> "* * * If there is a question about the title to the land, the law requires that the Attorney General bring suit to recover the land or remove the cloud from the title thereof.
>
> "* * * It is the rule to offer for sale only vacant and unoccupied public domain."

Juencke v. *Terrell, supra,* was again cited as authority in 1960, in the case of *Foster* v. *Gulf Oil Corporation,* 335 S. W. 845, 848, Civ. App.

With the official records in the General Land Office showing that these lands were sold to settlers by contract in 1910 and that these settlers and their heirs and vendees having paid interest on these contracts for several decades and that this plaintiff's claims to this land was well known by the Land Commissioner and were on file as official records in his office. R. 43-125 These claims by plaintiff had been made before any intervening third party rights had taken place on July 23, 1952. Based on the above authority cited it would seem that the Attorney General had a duty to adjudicate the plaintiff's claim before the Land Commissioner could resell the land that had been sold ever since 1910.

The Land Commissioner was without authority to sell these lands which had already been sold and awarded in 1910 to settlers and had settler vendee's claims against them on file in his office as of July 23, 1952. He issued awards to the defendant on the same day that the applications arrived in his office November 14, 1955 and then issued patents on them in 1956. These patents, as a matter of law, had no effect.

FOURTH POINT.

If the Land Commissioner and His Attorneys Were Correct in Refusing Plaintiff's Reinstatement Because the Legislative Change in the Acts of 1941, 1951, 1955, Then These Legislative Acts Taken Together, Impair the Obligation of Contract, Insofar as They Attempt to Apply to Contracts Made Before Their Enactment and are Unconstitutional.

As we have seen in the early part of this brief the Supreme Court of Texas has for over a half century held many times and up to the present date, that the right of the settlers vendees, to reinstate their forfeited lands, is a vested right.

As the limitation period of five (5) years time was not in the Statute of 1897, the Land Commissioner would have to be using the provision which was amended in 1941 and in 1951, so if he and his attorneys are correct in the contention then they were using these amended Acts which the Legislature passed after the contract was made in 1910.

Art. 1, Sec. 10 of the Constitution of the United States in part is as follows:

> "No state shall * * * pass any * * * law impairing the obligation of contracts * * *."

As we have set out before in the early part of the brief, the *Act of 1897, ch. 129*, which provided for the reinstatement of forfeited lands did not have in it, the five (5) year statutory time of exercising the right, as well as other basic requirements. This statute was

cited in the contract of 1910 as "Chapter 129, Act of May 19, 1897."

In 1941 and 1951 the Legislature amended this Act and put in, among other basic changes as grazing leases and delays by reason thereof, and the five (5) year limitation specified.

> "Forfeitures by statute or contract are not favored." *Gulf Production Co.* v. *State, supra,* 98 Tex. 237, 231 S. W. 124, 131.

The Land Commissioner in his letter of July 24, 1952 stated that the only reason for denying the reinstatement to the plaintiff of his forefeited lands was because he had not exercised his right within the five (5) year time limitation. He was applying the 1951 and 1941 Amended Acts. If the Commissioner is correct in his contention then these Acts impaired the obligation of contract, insofar as they apply to contracts made before their enactment, and taken together with the Act of 1955, selling plaintiff's lands without adjudication, are unconstitutional.

Bradley v. *Lightcap,* 195 U. S. 1, 20, 24 (1904). The facts in this case are: At the time of the execution of the deed of trust the statutes of Illinois contained no limitation of time within which a Sheriff's or Master's deed must be taken after the period of redemption had expired, and prescribed no preliminary or laws of right to purchase by reason of delivery or failure in taking out such a deed. Subsequent to the execution of the deed of trust, and prior to the foreclosure of it, the Legislature passed an Act providing

that the Sheriff's and Master's deeds must be taken out within five (5) years from the expiration at the time of redemption and providing, that when such deed is not taken out within such time, the certificate of purchase shall be null and void. The Court held, that the law did not apply to deeds of trust executed prior to the passing of the Act and made the following statement:

> "But this Court held, through Mr. Justice Miller, that all of the laws of the state existing at the time a mortgage or any other contract is made, which affects the rights of parties to the contract, entered into and became a part of it, and are obligatory on all Courts which assume to give a remedy on such contract; * * * that it is therefore said that these laws enter into and become a part of the contract—and that the remedy subsisting in a state when and where a contract is made and to be performed is a part of the obligation * * * The statutes contain no limitation of time within which a Sheriff's or Master's deed must be taken after the period of redemption had expired. * * *"

After the contract was made the Legislature passed an Act which changed and added a five (5) year limitation as follows: Section 30 of the new Act provided:

> "When the premises mentioned in any such certificate shall not be redeemed in pursuant of law, the legal holder of such certificate shall be entitled to a deed, therefore, at any time within five (5) years from the expiration of the time of redemption. * * * When such deed is not taken within the time limit by this Act, the certificate of purchase shall be null and void. * * *"

At p. 24, it is further said by the Supreme Court:

> "But reading the Act as the view of the Supreme Court tells us to do, as taking away her right to maintain her possession, we are of the opinion that it materially impairs the obligation of her contract, and deprives her of property without due process.
>
> "Judgment reversed."

It will be noted that the above five (5) year limitation is very similar to the five (5) year limitation which was put on by the Texas Legislative Amendments in the 1941 and 1951 Acts.

The Supreme Court of the State of Texas also has ruled unconstitutional the Act of changing from a ten (10) year Statute of Limitation to a four (4) year Statute of Limitation and in one of the leading cases which has been since quoted, *Frank* v. *The State Bank and Trust Company*, Tex. Com. App. 1924 (Entered as Judgment of Supreme Ct.), 263 S. W. 255, 256, 258, the facts are set out at p. 255 S. W.:

> "The Legislature in 1913 amended Art. 5693 of the Civil Statutes (Vernon, Sayles' Ann. Civ. St. 1914, Art. 5693) changed the time for sale of trust deed under deeds of trust from ten (10) to four (4) years, and provided that new limitations should apply to deeds of trust executed prior to the passing of the new Act."

Plaintiffs in error contends that the Act of 1913, insofar as it attempts to change the period of limitation of sale, under the deed of trust then existing and executed subsequent to 1905, is in contravention of

both the State and Federal Constitution, in that said Act impairs the obligation of contract.

It was said by the Court:

"6 Ruling Case Law, p. 325, states the general rule as to this question as follows:

'Conformably to the well-established rule that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms, the obligation of a contract is measured by the standard of the laws in force at the time it was entered into, and its performance is to be regulated by the terms and the rules which they prescribe.'

"And it as applied to mortgages on page 365, same volume, it is stated: 'The general rule is that the law in force at the time the mortgage is executed, with the condition and limitation it imposes, is the law which determines the force and affect of the mortgage; and hence it is that changes in the law imposes conditions and restrictions on a mortgagee in the enforcement of his right, and which affects its substance, are invalid as impairing the obligation and cannot prevail.'

"* * * Such Legislation impairs the obligation of contract, takes away vested rights, and is therefore prohibited by the Constitution."

At p. 258:

"We therefore hold that the Amendment of 1913 is unconstitutional insofar as it attempts to apply the new period of limitation of four (4) years, to the deeds of trust that were executed prior to the enactment of the Amendment.

"Cureton J. C. The judgment recommended will be entered as a judgment of the Supreme Court" of Texas.

Later in 1927 the United States Court of Appeals for the Fifth Circuit in *Drumright, et al. v. Texas Sugarland Co., et al.*, 16 F. 2d 657, 658, cert. denied, 1927, 274 U. S. 749, had before it the same question which was before the Texas Court in the *Frank v. The State Bank and Trust Company, supra.* It involved the ten (10) year Statute of Limitations reduced to four (4) years and also mortgage deeds of trust where the Legislature passed the Act subsequent to the making of the contract and the Court said in citing the above Texas case at p. 658 as follows:

"The Act of the Texas Legislature of 1913 (Vernon's Sayles' Tex. Civ. Statute 1914, Art. 5693), providing that the lien of a mortgage shall cease to exist four years after the maturity of the debt secured thereby, is unconstitutional as to the above mentioned mortgage, executed in 1907 and securing a debt, which matured in 1918, the previous existing Statute, which prescribed a limitation of ten (10) years, being applicable to such mortgage. *Frank v. State Bank and Trust Company*, Tex. Com. App., 263 S. W. 255."

In the *General Principles of Constitutional Law in the United States of America, 3rd edition* by Thomas M. Cooley, and Andrew C. McLaughlin, at p. 331 note three says as follows:

"A general law which is a standing offer of land becomes a contract if the offer is accepted

and payment made, so that the certificate of sale cannot be cancelled under the new law. *Pennoyer v. McConnaughty*, 140 U. S. 1."

The facts in this case are: The State Legislature in 1870 passed an Act selling sump land which inured to the party under the Act of 1860. In 1878 Owens made an application to purchase sump land. Patent would not issue until all monies were paid. 20% of the amount was paid. Before all of the amount was paid the State Legislature passed another Act in 1887 declaring void and of no effect all of the former certificates issued.

A citizen of California had bought some of these certificates and brought a suit in equity and asked for an injunction to prohibit the enforcement of the 1887 Act claiming that it violated the impairment of the obligation of contract under the Constitution of the United States.

It was stated at p. 24:

> "In other words, by such payment, this contract with the state become so ~~fully~~ executed as to be in force in a class of contracts protected by Art. 1, Sec. 10 of the Const. of the United States which declares that 'No state shall pass any law impairing the obligation of contract'."

Further at p. 25:

> "That Legislation surely impaired the obligation of the contract Owen had with the State, for its effect was to destroy valuable property, rights and privileges belonging to him."

It is further said p. 18:

> "The case cannot be distinguished in principle, from *Osborn* v. *Bank*, *Davis* v *Gray*, *Board* v. *McComb*, and *Allen* v. *The Railroad Company*, cited above;[1] and the reasoning in those cases apply with equal force in this."

A state cannot modify, except by mutual consent, any provision of a pre-existing contract into which it may have entered. *New Jersey* v. *Wilson*, 7 Cranch, 164, 167; *Sovereign Camp* v. *Wilentz*, 23 F. S. 23, appeal dis., 306 U. S. 573, D.C.N.J., 1938; *Columbia Railroad Company* v. *South Carolina*, 261 U. S. 236, 248, 251 (1922).

Mr. Chief Justice Marshall gave us some light on this subject as far back as 1812, in *New Jersey* v. *Wilson, supra.* The State of New Jersey had passed Legislation giving the Indians a part of the land tax free provided the Indians released their rights to the rest of certain portions of land. Later the New Jersey Legislature repealed this Act and tried to make the Indians' vendees pay taxes and speaking for the Court, he said:

> "The purchaser succeeds, with the assent of the State, to all the rights of the Indians. He stands, with respect to its land, in their place, and claims the benefits of their contract. This contract is certainly impaired by a law which would annul this essential part of it."

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[1] *Osborn* v. *Bank*, 9 Wheat. 738; *Davis* v. *Gray*, 16 Wall 203; *Board* v. *McComb*, 92 U. S. 531, 541; *Allen* v. *The Railroad Company*, 114 U. S. 311.

After the Land Commissioner had refused to reinstate the land in carrying out the provisions of the amended Act of the Legislature of 1941 and 1951, the Legislature again in 1955 passed an Act granting the Land Commissioner the right to sell this land and other lands totaling 14,000 acres, to the defendant. This was known as *Senate Bill No. 295, Ch. 278, 56th Legislature, regular Session 1955.* This Act was what they call a Special Local Act and is not found in any of the Vernon's Civil Statutes of the State of Texas but was found in the Secretary of State's Office. (Appendix to this brief, no. 4.) Plaintiff never heard of this Act, until June 1, 1961.

We may obtain some assistance from Mr. Justice Sutherland in speaking for the Supreme Court, said in *Columbia Ry. Co. v. So. Carolina, supra,* 261 U. S. 236, 248, 251 (1922), as follows:

> "We begin the inquiry with the general rule before us 'Conditions subsequent, especially when relied on to work a forfeiture, must be created by express terms or clear implication and are not construed strictly'. * * *
>
> "The effect of the Act of 1917 is to convert that which we have held to be a covenant into a condition subsequent and to impose as a penalty for its violation the forfeiture of an extensive and valuable property. It requires no argument to demonstrate that this constitutes an impairment of the contract here involved, in violation of the Constitution. The impairment of a contract may consist in increasing the burdens as well as in diminishing its efficiency. 'Any deviation from its terms, by postponing or accelerating the period

of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are however minute, or apparently immaterial, in their affect upon the contract of the parties, impairs its obligation.' *Green* v. *Biddle*, 8 Wheat 1, 84. * * *"

CONCLUSION.

The plaintiff, as a matter of law, substantially complied with the reinstatement of his forfeited lands on July 23, 1952 regardless of the actions taken by the Land Commissioner.

The defendant, as a matter of law, received no legal rights when it received the patent in 1956 from the General Land Office Commissioner, who acted without authority.

The General Land Commissioner and his attorneys acted without authority and of no affect when they refused to reinstate the forfeited land to the plaintiff by his letter of July 24, 1952.

The General Land Office Commissioner in refusing to apply the 1897 Act which was part of the plaintiff's contract of 1910 and written in it in two places, at the first two lines in the contract and in the "Obligation" later on, acted without authority and of no affect.

The General Land Office Commissioner in applying the amended Legislative Acts of 1941 and 1951, after the 1910 contract had been made, was without authority and of no affect.

During the time after forfeiture and before the reinstatement, the Supreme Court of Texas, from 1900

to 1960 has repeatedly held that plaintiff had vested rights, "provided that no rights of third persons may have intervened."

The Land Commissioner had received the written notice that plaintiff claimed these lands, which he acknowledged in his letter of July 24, 1952, copy of which remained an official record of the Land Office. When he did not reinstate the forfeited lands, the Attorney General of the State, under the Statutory Law at the time this contract was made, had a duty to adjudicate the question of the claims before the Land Commissioner had authority to resell them.

If the Land Commissioner and his attorneys were correct in applying the amended Acts passed in 1941 and 1951 and the Act of 1955, then the Legislative Acts themselves, taken together, impair the obligation of contract previously made and are unconstitutional, insofar as they apply to contracts made before the Legislative Acts were passed.

If the defendant received no rights under such patents it has nothing to ripen into a limitation period or to claim estoppel or apply the principle of laches. All the rights defendant has left, is to return the patents to the Land Commissioner and get the paid purchase money back from the Comptroller.

The plaintiff must pay the interest he has before tendered, but not accepted and returned and any other interest due since 1952 under his contract of 1910. Even though, as a matter of law, he substantially complied with the reinstatement of his forfeited lands on July 23, 1952.

In *Davis* v. *Yates*, 63 C. A. 6, 133 S. W. 281, 285, 286, Writ of Error Denied, Tex., 1911, as was said by the Court:

> "From what has been said Yates' statutory right to reinstate accrued when he made his request and complied with the statute, and the postponement of the official indorsement did not postpone his right * * *.
>
> "Besides, after the reinstatement and the cancellation, defendants had no recognized right to be protected by said limitation statute. * * *
>
> "We conclude there was no estoppel. * * *
> "We hold in this connection that such right of Yates became fixed as of the date of his compliance with the terms of the statute and at that time appellant Davis had acquired no rights."

Respectfully submitted,

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January 10, 1962.

APPENDIX No. 1.

Texas Statute, At Time Contract Was Made in 1910 for the Reinstatement of Forfeited Lands. Act Applying to This Plaintiff.

Texas, Acts 1897, ch. 129, pp. 184-185, S.S.B. No. 63, 25th Leg.

Article 4218f. When any portion of said land has been classified to the satisfaction of the commissioner of the general land office, under the provisions of this chapter or former laws, such lands shall be subject to sale, but to actual settlers only, except where otherwise provided by law, and in quantities of not less than eighty acres or multiples thereof, nor more than four sections containing six hundred and forty acres, more or less; provided, that the purchaser shall not include in his purchase more than two sections of agricultural land; and provided, that where there is a fraction less than eighty acres of any section left unsold, such fraction may be sold. Any bona fide purchaser who has heretofore purchased or who may hereafter purchase any lands as provided herein shall have the right to purchase other lands in addition thereto; provided, that the total of his purchases shall not exceed four sections, and that it shall not include more than two sections of agricultural land, upon his making oath that he is not acting in collusion with others for the purpose of buying the land for any other person or corporation, and that no other person or corporation is interested in the purchase thereof. And if he or his vendor has already resided upon his home section for three years, or when he or his vendor, or both together, shall have resided upon it for three years, the additional lands purchased may be patented at any time. In all cases where a settler purchases more than one section the lands in excess of one section so purchased must be

situated within a radius of five miles of the land occupied by him. Where any of the lands referred to in this act have been sold prior to July 30th, 1895, in quantities greater or less than forty acres or multiples thereof, and are in good standing as to interest payments, they may be patented in such quantities. *In any cases where lands have been forfeited to the State for the non-payment of interest, the purchasers or their vendees may have their claims reinstated on their written request, by paying into the treasury the full amount of interest due on such claim up to the date of reinstatement; provided, that no rights of third persons may have intervened. In all such cases the original obligations and penalties shall thereby become as binding as if no forfeiture had ever occurred.* (Emphasis added.)

APPENDIX No. 2.

Acts 1941, 47th Leg., p. 351, Ch. 191, Sec. 3; Article 5326, Vol. 15 Vernon's Civil Statutes of the State of Texas, Annotated.

Art. 5326. 5423 Forfeiture for nonpayment of interest; reinstatement; outstanding grazing leases

If any portion of the interest on any sale should not be paid when due, the land shall be subject to forfeiture by the Commissioner entering on the wrapper containing the papers "Land Forfeited," or words of similar import with the date of such action and sign it officially, and thereupon the land and all payments shall be forfeited to the State, and the lands may be offered for sale on a subsequent sale date. *In any case where lands may hereafter be forfeited to the State for non-payment of interest, the purchasers, or their vendees, heirs, or legal representatives, may have their claims reinstated on their written request, by paying into the Treasury the full amount of interest due on such claim up to the date of reinstatement, provided that no rights of third persons may have intervened.* The right to reinstate shall be limited to the last purchaser from the State or his vendees or their heirs or legal representatives. *Such right must be exercised within five (5) years from the date of the forfeiture,* and the right to reinstate any claim heretofore forfeited by the Commissioner must be exercised within five (5) years from the effective date of this Act, but not thereafter. In case there is an outstanding valid grazing lease which would prevent reinstatement within the time prescribed by this Act then such claim may be reinstated within sixty (60) days after the expiration of such grazing lease, provided application for reinstatement shall have been filed in the General Land Office within the five-year period above prescribed accompanied with payment of all interest due thereon. *In all such cases, the*

original obligations and penalties shall thereby become as binding as if no forfeiture had ever occurred. If any purchaser shall die, his heirs or legal representatives shall have one year in which to make payment after the first day of November next after such death before the Commisisoner shall forfeit the land belonging to such deceased purchaser, and should such forfeiture be made by the Commissioner within said time, upon proper proof of such death being made such forfeiture shall be set aside. Nothing in this Article shall inhibit the State from instituting such legal proceedings as may be necessary to enforce such forfeiture, or to recover the full amount of the interest and such penalties as may be due the State at the time such forfeiture occurred, or to protect any other right to such land. Acts 1897, pp. 39, 184; Acts 1919, p. 314; Acts 1941, 47th Leg., p. 351, ch. 191, § 3. (Emphasis added.)

APPENDIX No. 3.

Acts 1951, 52nd Leg., p. 92, Ch. 59, Sec. 2; Article 5326, Volume 15, Vernon's Civil Statutes of the State of Texas, Annotated.

Art. 5326, 5423. Forfeiture for nonpayment of interest; reinstatement; outstanding grazing leases

If any portion of the interest on any sale should not be paid when due, the land shall be subject to forfeiture by the Commissioner entering on the wrapper containing the papers "Land Forfeited," or words of similar import, with the date of such action and sign it officially, and thereupon the land and all payments shall be forfeited to the State, and the lands may be offered for sale on a subsequent sale date. *In any case where lands have heretofore been forfeited or may hereafter be forfeited to the State for nonpayment of interest, the purchasers, or their vendees, heirs or legal representatives, may have their claims reinstated on their written request by paying into the Treasury the full amount of interest due on such claim up to the date of re-instatement, provided that no rights of third persons may have intervened. The right to re-instate shall be limited to the last purchaser from the State or his vendees or their heirs or legal representatives. Such right must be exercised within five (5) years from the date of the forfeiture.* In case there is an outstanding valid grazing lease which would prevent re-instatement within the time prescribed by this Act then such claim may be re-instated within sixty (60) days after the expiration of such grazing lease, provided application for re-instatement shall have been filed in the General Land Office within the five-year period above prescribed, accompanied with payment of all interest due thereon. *In all cases the original obligations and penalties shall thereby become as binding as if no forfeiture had ever occurred.* If any purchaser shall die,

his heirs or legal representatives shall have one (1) year in which to make payment after the first day of November next after such death, before the Commissioner shall forfeit the land belonging to such deceased purchaser; and should such forfeiture be made by the Commissioner within said time, upon proper proof of such death being made, such forfeiture shall be set aside, provided that no rights of third persons may have intervened. Nothing in this Article shall inhibit the State from instituting such legal proceedings as may be necessary to enforce such forfeiture, or to recover the full amount of the interest and such penalties as may be due the State at the time such forfeiture occurred, or to protect any other right to such land. As amended Acts 1951, 52nd Leg., p. 92, ch. 59, § 2. (Emphasis added.)

APPENDIX No. 4.

Acts 1955, Senate Bill No. 295, Chapter No. 278, 56th Leg., Regular Session, 1955, Signed by the Governor on May 20, 1955 and Filed in Secretary of State's Office May 23, 1955. Not in Any of Vernon's Civil Statutes of the State of Texas.

CHAPTER No. 278

S. B. No. 295

AN ACT

authorizing the Commissioner of the General Land Office for the State of Texas to sell Public Free School Land situated in El Paso County, Texas, to the City of El Paso, Texas; and declaring an emergency.

Be It Enacted By The Legislature Of The State Of Texas:

Section 1. The Commissioner of the General Land Office is hereby authorized to sell to the City of El Paso, El Paso County, Texas, for a total consideration based on the aggregate fair and reasonable market value of said land, but no less than $6.50 per acre, as determined by two appraisers appointed by the Commissioner of the General Land Office of Texas, the following described Public School Lands situated in El Paso County, and described as follows, to-wit:

Township 1, Block 81—T & P Railway Co. Survey

N½ of Section 28	321 acres
Section 22	642 acres
Section 18	642 acres
Section 24	642 acres
Section 4	663.6 acres
Section 16	670.7 acres
Section 6	661.2 acres

Township 1, Block 82—T & P Railway Co. Survey
Section 10 . . . . . 640 acres

Township 1, G. A. Mundy Survey
Section 248 . . . . . 640 acres
Section 249 . . . . . 640 acres
Section 250 . . . . . 640 acres
Section 251 . . . . . 259.5 acres

L. E. Mundy Survey
Section 232 . . . . . 640 acres
Section 234 . . . . . 640 acres
Section 235 . . . . . 292 acres

N. D. Mundy Survey
Section 245 . . . . . 560 acres
Section 246 . . . . . 637.5 acres
N ½ of Section 240 . . . . . 328.65 acres

S. J. Larkin Survey
Section 269 . . . . . 640 acres
Section 268 . . . . . 640 acres
Section 267 . . . . . 640 acres

H. G. Foster Survey
Section 256 . . . . . 640 acres
North ½ of Section 257 . . . . . 320 acres
North ½ of Section 258 . . . . . 320 acres
Section 262 . . . . . 640 acres

and aggregating 14,000.15 acres. Said lands shall be sold upon the filing in the General Land Office of an application to purchase by the proper authority of the City of El Paso accompanied by payment of the full consideration herein provided. Such sale shall be subject to any right-of-way easements, surface leases, or any oil, gas, mineral leases or permits theretofore given by the State on said lands. All mines and minerals and mineral rights, including oil and gas in and under said lands, together with the right to enter thereon for the purpose of exploration and development, are hereby reserved to the State of Texas, and said lands shall be subject to lease by the State for mineral exploration and development in the same manner as is now, or may

hereafter be provided for the leasing of unsold Public Free School Lands; provided, however, that the School Land Board or other legally constituted authority offering said lands for lease shall place in said leases such rules and regulations as may be deemed proper by said board or agency for the prevention of pollution and contamination of the fresh waters in, on, and under said lands.

Sec. 2. Upon payment of the purchase money provided herein, payments of fees required by law, and the filing in the General Land Office of any field notes or corrected field notes required by the Commissioner of the General Land Office, patents shall be issued to the City of El Paso containing the reservations provided for in Section 1 of this Act.

Sec. 3. The fact that the City of El Paso is in urgent need of expanding its sources of water and of protecting water wells previously drilled creates an emergency and an imperative public necessity that the Constitutional Rule that each bill be read on three several days in each House be suspended, and such Rule is hereby suspended, and this Act shall take effect from and after its passage, and it is so enacted.

(s) Ben Ramsey
President of the Senate

(s) Jim Lindsey
Speaker of the House

I hereby certify that S. B. No. 295 passed the Senate on April 25, 1955, by a viva voce vote; May 9, 1955, Senate concurred in House amendments, by a viva voce vote.

(s) Loyce M. Bell
Secretary of the Senate

I hereby certify that S. B. No. 295 passed the House on May 5, 1955, with amendments, by the following vote: Yeas 136, Nays 0.

(s) Dorothy Hallman
Chief Clerk of the House

Approved:
May 20, 1955
Date

Allan Shivers
Governor

Filed in the Office of the
Secretary of State
10 o'clock
May 23, 1955
(s) A. M. Muldrow
Secretary of State

(Seal)

THE STATE OF TEXAS
Secretary of State

I, W. O. Bowers, III, Assistant Secretary of State of the State of Texas Do Hereby Certify that the attached is a true and correct copy of the following described instruments on file in this office;

Senate Bill No. 295, 56th Legislature, Regular Session, 1955, as signed by the Governor on May 20, 1955 and filed for record in this office on May 23, 1955.

In Testimony Whereof, I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in the City of Austin, this 15th day of September, A. D. 1961.

(s) W. O. Bowers, III
Assistant Secretary of State

(Seal)

APPENDIX No. 5.

Duty of the Attorney General of the State of Texas As It Was in 1910, Date of Contract.

Acts, Feb. 23, 1900, Sec. 8, Ch. 11, p. 29 at pp. 33-34, First Called Session.

SEC. 8. *When any of the lands described in this act, or any of the other public lands of the State held or owned by any fund, or any lands in which this State, or any such funds have an interest, are held, occupied or claimed by any person or association or corporation, adversely to the State, or to such fund; it shall be the duty of the Attorney-General* to institute suit therefor, together for rent thereon, for any damages thereto, and for the purpose of any such suits for such lands, *or affecting the title thereto or right growing out of the same,* the venue thereof is fixed in Travis county, Texas, concurrently with the county of defendant's residence, and the courts of said county shall have the same jurisdiction over the defendant and the subject matter of the same as if such defendant resided, and such property was situated in said county. (Emphasis added.)

Office-Supreme Court, U.S.
FILED
AUG 24 1964
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM 1963

No. 38

CITY OF EL PASO,

Appellant,

v.

GREENBERRY SIMMONS,

Appellee.

Appeal from the United States Court of Appeals for the Fifth Circuit

BRIEF FOR APPELLANT

WILLIAM J. MOUNCE,
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In the

Supreme Court of the United States

OCTOBER TERM 1963

No. 866

CITY OF EL PASO,

Appellant,

v.

GREENBERRY SIMMONS,

Appellee.

Appeal from the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR APPELLANT

OPINION BELOW

The decision appealed from is reported in Volume 320 Federal Reporter 2d Series, Pages 541-545. A copy of the decision appears in the Transcript of Record beginning at page 153.

STATEMENT OF JURISDICTION

Suit was instituted by Appellee, Greenberry Simmons, to quiet title to two parcels of land comprising 620.25 acres

located in the City and County of El Paso, Texas. Federal jurisdiction was based on 28 U.S.C.A. §1332. The trial court sustained Appellant's motion for summary judgment; however, the United States Court of Appeals for the Fifth Circuit, by decision dated July 18, 1963, reversed and remanded the case. Appellant's petition for rehearing was denied by order dated August 29, 1963, and judgment was entered on the decision of the United States Court of Appeals on September 7, 1963. Notice of Appeal was filed in the United States Court of Appeals for the Fifth Circuit on November 27, 1963. Appellant applied for, and by order dated February 15, 1964, was granted a thirty day extension within which to docket its appeal and file a jurisdictional statement. Probable jurisdiction was noted April 20, 1964. The United States Court of Appeals held a statute of the State of Texas unconstitutional. This appeal, therefore, is taken pursuant to 28 U.S.C.A. §1254 (2). Although the Court of Appeals remanded the case, for all practical purposes the decision can probably be considered as final. *Cf. City of Chicago v. Atchison, Topeka and Santa Fe Railway Co.*, 357 U.S. 77; 78 S.Ct. 1063 (1958).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

This case involves the following constitutional provision and statute:

A. CONSTITUTIONAL PROVISION.

Article I, Section 10 — United States Constitution

"No State shall enter into any Treaty, Alliance, or Confederation; grant Letter of Marque and Reprisal;

coin Money; emit Bill of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

B. STATUTE INVOLVED.

Article 5326 of Vernon's Annotated Texas Statutes

"If any portion of the interest on any sale should not be paid when due, the land shall be subject to forfeiture by the Commissioner entering on the wrapper containing the papers "Land Forfeited", or words of similar import, with the date of such action and sign it officially, and thereupon the land and all payments shall be forfeited to the State, and the lands may be offered for sale on a subsequent sale date. In any case where lands have heretofore been forfeited or may hereafter be forfeited to the State for non-payment of interest, the purchasers, or their vendees, heirs or legal representatives, may have their claims reinstated on their written request by paying into the Treasury the full amount of interest due on such claim up to the date of re-instatement, provided that no rights of third persons may have intervened. The right to re-instate shall be limited to the last purchaser from the State or his vendees or their heirs or legal representatives. Such right must be exercised within five (5) years from the date of the forfeiture. In case there is an outstanding valid grazing lease which would prevent re-instatement within the time prescribed by this Act, then such claim may be reinstated within sixty (60) days after the expiration of such grazing lease, provided application for reinstatement shall have been filed in the General Land Office within the five-year period above prescribed, accompanied with payment of all interest due thereon. In all cases the original obligations and penalties shall thereby become as binding as if no forfeiture had ever occurred. If any purchaser shall die, his heirs or legal representatives shall

have one (1) year in which to make payment after the first day of November next after such death, before the Commissioner shall forfeit the land belonging to such deceased purchased; and should such forfeiture be made by the Commissioner within said time, upon proper proof of such death being made, such forfeiture shall be set aside, provided that no rights of third persons may have intervened. Nothing in this Article shall inhibit the State from instituting such legal proceedings as may be necessary to enforce such forfeiture, or to recover the full amount of the interest and such penalties as may be due the State at the time such forfeiture occurred, or to protect any other right to such land."

QUESTION PRESENTED

The land purchase contracts upon which Appellee's claim is based were forfeited by the State of Texas for nonpayment of interest and were not reinstated within the five-year period required by *Article 5326*. The five-year limitation feature contained in the statute, however, was enacted subsequent to the time the land purchase contracts were entered into. The question therefore presented by this appeal is whether the application of the five-year limitation provision of *Article 5326* to Appellee's land purchase contracts is repugnant to Article 1, Section 10 of the United States Constitution.

STATEMENT OF THE CASE

Appellee's predecessors entered into purchase agreements with the State of Texas in 1910 (T.R. 43, 67). A Texas statute (*Article 4218f*, quoted in the Appendix beginning

on page A-20) in effect in 1910 provided that a forfeited land purchase contract could be reinstated by payment of all back interest, provided that the rights of no third party had intervened. *Article 4218f*, from which *Article 5326* was derived, was amended in 1941, to provide that the privilege of reinstatement must be exercised within five years from the date of forfeiture. The land purchase contracts in question provide essentially that the purchaser will pay a certain specified sum to the State of Texas and upon payment in full, the State will issue a patent covering the land. On July 21, 1947, the purchase contracts were forfeited for failure to pay interest (T.R. 26, 28). Appellee, via quitclaim deeds dated June 10, 1952, acquired the vendees' right, title and interest in and to the lands in question (T.R. 104, 110). Apparently Appellee in the latter part of July, 1952, filed an application for reinstatement pursuant to *Article 5326* (T.R. 120, 121); however, since the application was not filed within the five year period required by *Article 5326*, it was rejected (T.R. 118, 119). Thereafter, the lands in question were, on November 15, 1955, awarded to Appellant pursuant to Senate Bill 295, Acts of the 54th Legislature, Ch. 278, 1955, which Act appears in the Appendix hereof beginning on page A-46. Appellant paid the full purchase price and on January 16, 1956, received patents from the State of Texas (T.R. 26, 28). On August 31, 1961, Appellee instituted this action. As stated above, the trial court awarded Appellant summary judgment, but the decision was reversed by the United States Court of Appeals for the Fifth Circuit.

ARGUMENT AND AUTHORITIES

ARTICLE 5326 MERELY MODIFIES THE REMEDY BY WHICH THE STATE OF TEXAS TERMINATES ITS LAND PURCHASE AGREEMENTS. THE COURT BELOW THEREFORE ERRED IN ADJUDGING THE STATUTE UNCONSTITUTIONAL.

As stated above, the land purchase contracts upon which Appellee's claim is based were properly forfeited for non-payment of interest (T.R. 26, 28). Appellee's application for reinstatement was not filed within five years from the date of forfeiture, as provided by *Article 5326* (T.R. 26, 28). As far as we have been able to determine, *Faulkner v. Lear*, 258 S.W. 2d 147 (Tex. Civ. App. 1953—error refused), is the only decision of the Texas courts construing *Article 5326*. That case involved a fact situation similar to the one presently under consideration and the Texas Court of Appeals held that an application for reinstatement filed more than five years after the date of forfeiture was ineffective, stating at page 149:

> "Since the Taylor sale was shown to have been forfeited to the State for non-payment of interest, such sale could have been reinstated only in compliance with the Statute, Article 5326 Vernon's Annotated Statutes of Texas, as amended in 1941. This Article provided that any sale forfeited theretofore must be reinstated within five years after the effective date of the amending act. This date was May 2, 1941. Taylor and his assignees, therefore, were precluded from reinstating his sale after May 2, 1946, five years after the effective date of the amendment, even if the rights of no third party had intervened. The Legislature further amended

> this Act in 1951 so that such Article 5326 now provides that such a forfeited sale can be reinstated only if proper application is made within five years after the date of the forfeiture."

Since there was an outright refusal of the writ of error in the *Faulkner* case, the opinion has the same dignity, and is entitled to the same weight as an opinion by the Texas Supreme Court. *Travelers Insurance Company v. Newson*, 352 S.W. 2d 888 (Tex. Civ. App. 1962).

The sole question presented by this appeal is whether *Article 5326*, as applied to Appellee's situation, impairs the obligations of his predecessors' contracts with the State of Texas. In order to decide whether a contract obligation has been impaired it is first necessary to determine the obligation imposed upon the parties to the contract. This precise point was decided by the Supreme Court of Texas in *Standifer v. Wilson*, 93 Tex. 232; 54 S.W. 898 (1900). In the *Standifer* case, one Dolan entered into a land purchase contract with the State of Texas, pursuant to an Act approved July 8, 1879, as amended by an Act approved April 6, 1881. Such Acts provided that before the State could terminate land purchase contracts in the event of default, the State would have to institute appropriate court proceedings and obtain a judgment of forfeiture. The Acts were amended in 1897 to provide that in the event a purchaser of lands from the State defaulted in payment, the Commissioner of the General Land Office could declare a forfeiture merely by endorsement on the files of the General Land Office. Dolan's purchase was forfeited in accordance

with the latter Act. Wilson succeeded to Dolan's interest and in the ensuing title action contended that the forfeiture was invalid. Wilson's principal point on appeal was that, as to him, the Act of 1897 was an impairment of an obligation of his contract, and consequently unconstitutional. The Texas Supreme Court rejected this contention, reasoning that the method by which the State terminates its contracts when the purchaser defaults is not a part of the contract, and consequently can be later altered or modified. The Texas Supreme Court, in discussing the obligations contained in the contract, stated at page 900:

> "The contract there provided for is an executory contract of sale and purchase, which arises upon acceptance of and compliance with the stated terms of the offer made by the state for the sale of the lands. The purchaser presents his application, makes the cash payment, causes the land to be surveyed, and executes his obligation to perform the things to be done in the future. The contract then is complete, and its terms are fixed. (Citation) Both the state and the purchaser are bound, so long as there is compliance with the obligation, — the purchaser to make the further payments, and the state, upon completion thereof, to grant the land to the purchaser. But no title passes, and a right of rescission in the state may arise, just as it might arise in an individual, upon default in performance on the part of the other party. . . . There is no undertaking on the part of the State with the purchaser that the remedy prescribed in this statute and no other shall be pursued unless it is to be implied from the mere presence of the provisions in the statute; and we think it well settled that no such implication arises."

The case just cited was affirmed by the United States Supreme Court. *Wilson v. Standifer*, 184 U.S. 399 (1902).

The United States Supreme Court was confronted with a similar situation in the case of *Waggoner v. Flack*, 188 U.S. 595 (1903). In November of 1895, the land in question was purchased by one Phillips under the provisions of the Act of 1883, as amended by the Act of February 16, 1885. When Phillips purchased the lands, the State of Texas had no statutory authority to forfeit the purchase. An Act approved effective as of May 19, 1897 authorized the Land Commissioner to forfeit purchases of state lands for non-payment of interest. The forfeiture was accomplished by an endorsement on the Land Office file, and became final unless a suit contesting the validity of the forfeiture was instituted within six months from the date of endorsement. The Phillips purchase was forfeited for non-payment of interest, in accordance with the 1897 Act. Waggoner, Phillips' successor, contended that as to him, the 1897 Act was an unconstitutional impairment of the obligation of his contract since at the time his predecessor entered into the agreement, there was no statutory method by which the State could terminate a purchase contract. The Supreme Court denied this assertion, and held that a forfeiture provision or lack thereof did not become a part of the contract, and that a State could, from time to time, enact laws giving it a new or different remedy for violation of contracts, stating at page 601:

> "We must first decide what were the obligations of a contract which was created by the granting of Phillips' application for the purchase of this land, and the taking of his notes therefor. The Laws of Texas of 1883, Chapter 58, as amended by Chapter 12, page 13, Laws of 1885, furnished the evidence of the obligations of the contract. By those Acts it was made the duty of the

> Commissioner of the General Land Office, after an application for a grant of land had been made and approved, to issue a patent to the purchaser or his assigns, etc., upon payment of all the purchase money and interest upon the notes given for the purchase of the land, and provision was made for the giving of the notes or other evidences of the obligation of the purchaser to pay for the land. His obligation was to pay these notes as they matured. The obligation of the State was to give the patent as mentioned. What particular remedy then existed by which the State might enforce the obligations of the contract made by the purchaser is not material in this aspect of the case."

The Court further stated at page 603:

> "A purchaser of lands at the time Phillips purchased had no right to assume that the state would not alter the law in the future so far as to give it another and better or a quicker remedy for a violation of his contract by the purchaser than existed at the time the purchase was made. To enact laws providing remedies for a violation of contracts, to alter or enlarge those remedies from time to time as to the legislature may seem appropriate, is an exercise of sovereignty, and it cannot be supposed that the state, in a case like this, contracts, in a public act of its legislature, to limit its power in the future, even if it could do so, with or without consideration, unless the language of the act is so absolutely plain and unambiguous as to leave no room for doubt that its true meaning amounts to a contract by it to part with its power to increase the effectiveness of existing remedies as against those who purchase lands while the act remains alive. No such language is to be found in the act in question, and none ought to be implied."

Another case in point is that of *Aiken v. Kingsbury*, 247 U.S. 484 (1918). In that case, Aiken's predecessor purchased land from the State of California in 1869. At the time of the purchase the laws of California provided that in the

event a purchaser defaulted, the State, in order to terminate the contract, must bring a court proceeding and obtain a judgment of default. The purchaser or his assigns would then have twenty (20) days after entry of the judgment to redeem the land by paying all amounts due the State, plus Court costs. The earlier Acts were amended in 1889 to provide that, under certain circumstances, a land purchaser whose contract had been in default for a period of five years would lose all interest in the land unless he paid all past due interest within six months after passage of the Act. Aiken contended that the subsequent Act, as applied to him, was unconstitutional because it impaired the obligation of his contract with the State of California and deprived him of his property without due process of law. This Court found that the only obligation contained in the land purchase contract was that the State would furnish a patent to the land after the purchaser paid the stipulated sum. As to the enforcement of the contract, this Court states at pages 487-488:

> "The right of the State to foreclose such a contract for default in payment, and the right of the purchaser to redeem after a default decree, relate to the remedy as distinguished from the obligation of the contract, and both of these rights are constitutionally subject to modification by the State, within limits which were not exceeded in the Act before us. . . ."

There is no material distinction between the United States Supreme Court cases cited above and the situation now confronting this Court. The obligations imposed upon the parties to a land purchase contract are that the purchaser will pay the State a certain sum of money, and

upon payment in full in the manner provided, the State will issue a patent for the land. The other provisions contained in the Texas Public Land Acts pertain to the administration and enforcement of land purchase contracts. The section concerning foreclosure and reinstatement is merely the remedy by which the State enforces the land purchase contract. This Court, on numerous occasions, has held that State Legislatures may modify or change existing remedies, or prescribe new modes of procedure without impairing the obligations of contracts, if a substantial or efficacious remedy remains. *Conley v. Barton*, 260 U.S. 677 (1923); *Richmond Mortgage and Loan Corporation v. Wachovia Bank*, 300 U.S. 124 (1937). Under *Article 5326* a purchaser is given up to five years to remedy the default. This provision, Appellant submits, is most reasonable and considerably more lenient than provisions normally contained in land purchase agreements between private citizens.

Under *Article 4218f*, in effect at the time of execution of the land purchase contracts under consideration, a defaulting purchaser could have lost all right to the land immediately after the default to a third party purchaser. The five year limitation of *Article 5326* does not abridge or defeat any substantial right of a purchaser. At the time the land purchase contracts under consideration were entered into, the State of Texas was encouraging persons to settle upon its lands; *Anderson v. Neighbors*, 59 S.W. 543 (1900) consequently, the remedial provisions pertaining to land purchase contracts were quite liberal. At this time chances were excellent that if a forfeiture occurred, a third party would soon purchase the

lands if the lands were of any value. Times and circumstances, of course, have changed. It is common knowledge that the State of Texas no longer sells its lands except in very rare instances. As a result of this policy there is little likelihood that the rights of a third party will intervene in forfeited land purchase contract situations as was contemplated by *Article 4218f*. Consequently, the privilege of re-instatement became perpetual for all practical purposes. This was obviously the mischief *Article 5326* was designed to prevent and which, Appellant submits, is a legitimate exercise of legislative power. *Cf. Home Building and Loan Association v. Blaisdell*, 290 U.S. 398 (1934). Admittedly there is dicta in Texas decisions indicating that the privilege of re-instatement of a forfeited land purchase contract is a vested right. Cf. *Gulf Production Company v. State*, 231 S.W. 124 (Tex. Civ. App. 1921) and *Anderson v. Neighbors* (Supra). Such statements are merely dicta and have been refuted by the enactment of *Article 5326* and the decision of *Faulkner v. Lear* (Supra).

CONCLUSION

Article 5326 does not impair any obligation contained in the land purchase contracts between Appellee's predecessors and the State of Texas. The statute merely alters the remedy by which the State of Texas may rescind a land purchase contract in the event of default. Since Appellee failed to comply with the provisions of the statute, his rights to the lands in question terminated. Appellant respectfully submits that the decision of the United States Court of Appeals for

he Fifth Circuit should be reversed and the decision of the Jnited States District Court for the Western District of Texas should be affirmed.

Respectfully submitted

HARDIE, GRAMBLING, SIMS & GALATZAN,
Third Floor, El Paso Natural Gas Company Building,
El Paso, Texas,

By Thomas Hardie
Attorney for Appellant.

PROOF OF SERVICE

I, William J. Mounce of Hardie, Grambling, Sims & Galatzan, attorneys of record for the City of El Paso, Appellant herein, depose and say that on the 22nd day of August, 1964, I served a copy of the foregoing Brief for Appellant on Greenberry Simmons, Appellee herein, by mailing, air mail postage prepaid, a copy of same to Mr. Greenberry Simmons, Attorney at Law, Kentucky Home Life Building, Louisville, Kentucky and by mailing a copy of said Brief for Appellant to Mr. Harold Long, Attorney at Law, El Paso National Bank Building, El Paso, Texas, attorney for Greenberry Simmons.

Wm J. Mounce

WILLIAM J. MOUNCE

SUBSCRIBED AND SWORN TO before me by William J. Mounce at El Paso, Texas, this 22nd day of August, 1964.

Lee Jaggars

Notary Public,
El Paso County, Texas

APPENDIX

Chapter 47, Act of 1895:

"Section 1. Be it enacted by the Legislature of the State of Texas: That all lands heretofore or hereafter surveyed and set apart for the benefit of the public free schools, the Lunatic Asylum, the Blind Asylum, the Deaf and Dumb Asylum, and the Orphan Asylum shall be sold and leased under the provisions of this act.

Sec. 2. The Commisioner of the General Land Office is hereby vested with all the power and authority necessary to carry into effect the provisions of this act, and shall have full charge and discretion of all matters pertaining to the sale and lease of said lands, and their protection from free use and occupancy and from unlawful enclosure, with such exceptions and under such restrictions as may be imposed by the provisions of this act, or by the Constitution of the State. He shall, as soon as practicable, adopt such regulations not inconsistent with the Constitution or this act as may be deemed necessary for carrying into effect the provisions of this act, and may from time to time alter or amend such regulations so as to protect the public interest; but all regulations shall be submitted to the Governor for his approval before adoption or promulgation. He shall adopt all necessary forms of applications for sales or leases and all other forms necessary or proper for the transaction of the business imposed upon him by this act, and may from time to time call upon the Attorney General to prepare such forms; and it shall be the duty of that officer to furnish the Commissioner of the General Land Office with such advice and legal assistance as may be requisite for the due execution of the provisions of this act; and it shall be the duty of such Commissioner to call upon the Attorney General for advice whenever there is any doubt as to the meaning of this act or any provisions thereof.

Sec. 3. The Commissioner of the General Land Office shall from time to time, as the public intearest may require,

cause any or all of the lands belonging to the several funds mentioned in this act to be carefully and skillfully classified and valued that have not heretofore been classified, and for this purpose he may appoint, with the approval of the Governor, such number of competent agents, who shall be citizens of the county or district where such land is situated, as may be necessary, or may determine and declare the classification and valuation without the aid of such agents, and upon such facts as may be satisfactory to the Commissioner. Such agents shall receive for their work a reasonable compensation, to be fixed by the Commissioner of the General Land Office, and not to exceed the sum of three dollars per section; and no such expense shall be incurred in the absence of an appropriation by law to cover such expenditure, and the State shall not be liable for any expenditure of this character incurred in excess of current appropriations.

Sec. 4. It shall be the duty of such agents as may be appointed under the provisions of this act, under such restrictions and instructions as may be prescribed by the Commissioner of the General Land Office, to classify such lands belonging to the several funds mentioned in this act as the Commissioner may direct, into agricultural, pasture, and timber lands, and for this purpose they shall cerefully examine the same, and after such examination they shall prepare an accurate plat of each section, showing the relative proportions of timber and open land on such section, and their situation; also, the quality of the soil, the topography of the land, and the quality and kind of timber, and the streams and other sources of water supply, and their location, and such other facts as may be important; and from time to time, as may be prescribed by the Commissioner of the General Land Office, such agent shall prepare and forward to the Commissioner, with such plats, a tabulated statement of such lands so examined by him, with the value of each section, and such plats and reports when approved by the Commissoner, shall be filed in the General Land Office as a part of the records of said office; but nothing in this act shall be construed to require or authorize a classification of lands already classified under former laws: Provided, that any section or

part of any section heretofore classified as timbered land which is not pine land nor valuable chiefly for the timber thereon may be classified under the provisions of this act as agricultural lands.

Sec. 5. When any portion of said land has been classified to the satisfaction of the Commissioner under the provisions of this act or former laws, such lands shall be subject to sale, but to actual settlers only, and in quantities of not less than forty acres, and in mutiples thereof, nor more than one section containing six hundred and forty acres more or less: Provided, that when there is a fraction less than forty acres of any section left such fraction may be sold; but lands classified as purely pasture lands may be sold in quantities not to exceed four sections to the same settler.

Sec. 6. It shall be the duty of the Commissioner of the General Land Office to notify in writing the county clerk of each county of the valuation fixed upon each section of land in his county, and in each county attached to it for judicial purposes, which he offers for sale, which notification shall be kept by the clerk in his office and recorded in a well bound book which shall be open to public inspection.

Sec. 7. All lands belonging to the public free schools and the several asylum funds shall be sold at no less than two dollars per acre, except pasture lands, which shall be sold at not less than one dollar per acre, and all timber lands shall be sold at not less than five dollars per acre. By timber lands as here used is meant lands valuable chiefly for the timber thereon.

Sec. 8. Any bona fide actual settler who may reside on any part of the lands the sale of which is authorized by this act may go into effect, shall have the prior right for a period of ninety days after this act goes into effect, or after said land shall have been placed upon the market, to purchase such quantity of land as may be limited by this act, to include his improvements, upon complying with the provisions of this act regulating sales as in other cases, such land shall be appraised without reference to the improvements thereon. Any bona fide settler who has here-

tofore purchased or who may hereafter purchase not exceeding one section of agricultural land, shall have the right to purchase three strictly pastoral sections upon his making oath that he is not acting in collusion with others for the purpose of buying for any other person or corporation, and that no other person or corporation is directly or indirectly interested in the purchase of the same.

Sec. 9. All sales shall be made by the Commissioner of the General Land Office, or under his direction, and he shall prescribe suitable regulations whereby all purchasers shall be required to reside upon as a home the land purchased by them for three consecutive years next succeeding the date of their purchase, except when otherwise provided. Such regulations shall require the purchaser to reside upon the land for three consecutive years herein mentioned, and to make proper proof of such residence and occupancy to the Commissioner of the General Land Office within two years next after the expiration of said three years, by his affidavit corroborated by the affidavits of three disinterested and credible persons, to be certified by some officer authorized to administer oaths, and on making such proof the Commissioner shall issue to the purchaser, his heirs and assigns, a certificate showing that fact. If, however, any purchaser has sold his purchase, or any part thereof, his vendee shall be permitted to compute the time of the occupancy of his vendor as a part of his own occupancy; and if any person has sold the whole or any part of his purchase under this or any former law, his vendee, or if he refuses to do so, the vendor himself, may make proof of occupancy as provided herein. Any person desiring to purchase land in accordance with the provisions of this act shall forward his application to the Commissioner, describing the land sought to be purchased, which application shall be accompanied with the affidavit of the applicant, in effect that he desires to purchase the land for a home, and has in good faith settled thereon, except where otherwise provided herein, and he shall also swear he is not acting in collusion with others for the purpose of buying the land for any other person or corporation, and that no other person or corporation is interested in the purchase thereof. Any

owner of land heretofore purchased, and which land has been or may be forfeited for nonpayment of interest, shall have ninety days prior right after this act goes into effect, or after the land is again placed upon the market, to purchase said land without the condition of settlement and occupancy, in case it has been occupied for three consecutive years as required by law; but if not, then he shall reside thereon until the occupancy under the first and last purchase shall together amount to said term of three years: Provided, that when any forfeiture has been made the Commissioner of the General Land Office shall add to the appraised value of such land the amount of interest due thereon at the time of forfeiture, which shall be paid in cash with the first payment of one-fortieth of the appraised value of the land when purchased under the preference right to purchase given herein. Any original purchaser or his vendee of any of the lands the sale of which is provided for in this act, who has improved such land as a home, and who has been forced to temporarily abandon same on account of drouth, and who shall in good faith reoccupy the same, either by themselves or vendees, within six months after this act goes into effect, shall not have the forfeiture declared against them under the law providing for the forfeiture of such lands for non-occupancy: Provided, that they shall make affidavit, supported by the affidavit of three disinterested witnesses, that they have reoccupied the land as a home in good faith, and that they had abandoned the same since their purchase on account of the drouth and not otherwise; and such absence shall not be deducted from the three years occupancy required by law in making final proof of occupancy: And provided further, that any purchasers or their vendees of such lands who have failed to make proof of occupancy as required by the law regulating such purchases shall have six months after this act shall take efect to make such proof of occupancy as required by the provisions of this act. The purchaser shall transmit to the Treasurer of the State one-fortieth of the aggregate purchase money for the particular tract of land, and send to the Commissioner his obligation to the State, duly executed, binding the purchaser to pay to the State on the first day in November

of each year thereafter, until the whole purchase money is paid, one-fortieth of the aggregate price, with interest at the rate of three per cent per annum on the whole unpaid purchase money, which interest shall also be payable on the first day of November of each year; and upon receipt of one-fortieth of the purchase money by the Treasurer, and the affidavit and obligation aforesaid by the Commissioner, the sale shall be deemed and held effective from the date the affidavit and obligation are filed in the General Land Office: Provided, that if the land applied for be timbered land, then the purchaser shall be required to pay the full amount of the purchase money at the time of his purchase.

Sec. 10. Purchasers shall have the option of paying the purchase money for their lands in full at any time after they have occupied the same for three consecutive years; and when they have made such payment in full, together with the proof that they have occupied the land for three consecutive years, they shall receive patents for the same upon payment of the patent fees prescribed by law. Purchasers may also sell their lands or a part of the same, in quantities of forty acres or multiples thereof, at any time after the sale is effected under this act, and in such cases the vendee, or any subsequent vendee, or his heirs or legatees, shall file his own obligation with the Commissioner of the General Land Office, together with the duly authenticated conveyance or transfer from the original purchaser and the intermediate vendee's conveyance or transfer, if any there be, duly recorded in the county where the land lies or to which said county may be attached for judicial purposes, together with his affidavit, in case three years residence has not already been had upon said land and proof made of that fact, stating that he desires to purchase the land for a home, and that he has in good faith settled thereon, and that he has not acted in collusion with others for the purpose of buying the land for any other person or corporation, and that no other person or corporation is interested in the purchase, save himself, and thereupon the original obligation shall be surrendered or canceled or properly credited, as the case may be, and the vendee shall become the purchaser direct from the State, and be subject

to all the obligations and penalties prescribed by this act, and the original purchaser shall be absolved in whole or in part, as the case may be, from further liability thereon: Provided, that whenever a town shall be located and established upon any lands sold under this or any former act, the purchaser or his vendee shall be permitted to pay the entire balance of principal and interest due the State upon such land and obtain a patent therefor at any time, but no such payment shall be permitted or patent issued until such purchaser or owner of such land shall file in the General Land Office a certified plat of such town, made by a surveyor, which shall be accompanied by the affidavit of the owner of such land, corroborated by the affidavit of five disinterested and credible citizens of the county, to the effect that a town, giving its name, has been located and established upon the land, and that there has been erected therein, and is being occupied by bona fide citizens, twenty business and residence houses, or either, or both.

Sec. 11. If upon the first day of November of any year the interest due on any obligation remains unpaid, the Commissioner of the General Land Office shall endorse on such obligation "Land Forfeited," and shall cause an entry to that effect to be made on the account kept with the purchaser, and thereupon said land shall thereby be forfeited to the State without the necessity of re-entry or judicial ascertainment, and shall revert to the particular fund to which it originally belonged, and be resold under the provisions of this act or any future law: Provided, if any purchaser shall die, his heirs or legal representatives shall have one year in which to make payment after the first day of November next after such death, and shall be absolved and exempt from the requirement of settlement and residence thereon. And if any purchaser shall fail to reside upon and improve in good faith the land purchased by him, he shall forfeit said land and all payments made thereon to the State, in the same manner as for non-payment of interest, and such land shall be again for sale as if no such sale and forfeiture had occurred: Provided, that all necessary and temporary absence from such land of such purchaser, for the time of not more than six months

in any one year, for the purpose of earning money with which to pay for the land; or for the purpose of schooling his children, shall not work a forfeiture of his title: Provided, further, that nothing in this section contained shall be construed to inhibit the State from instituting such legal proceedings as may be necessary to enforce such forfeiture, or to recover the full amount of the interest and such penalties as may be due the State at the time such forfeiture occurred, or to protect any other right to such land, which suits may be instituted by the Attorney General or under his direction, in the proper court of the county in which the land lies or of the county to which such county is attached for judical purposes: Provided, this section shall be printed on the back of the receipt.

Sec. 12. In all cases where persons have purchased or may hereafter purchase State, school or asylum lands under any act of the Legislature authorizing the sale thereof and requiring a residence of three years thereon, and said persons have so resided upon said land or may hereafter reside thereon for the period of three years as required by law, and their files have been or may hereafter be cancelled and purchases annulled by the Commissioner of the General Land Office on account of conflict with other surveys, said persons shall have the right to purchase other lands of the classes mentioned in this act without being required to reside thereon. Persons desiring to avail themselves of the benefits of this provision shall make satisfactory proof to the Commissioner of the three years residence under their first purchase.

Sec. 13. In all cases where any of the lands mentioned in this act have been heretofore sold under any law authorizing the sale thereof, and the original purchaser shall have sold or may hereafter sell any part of his purchase in quantities of forty acres or multiples thereof, and the conveyance to his vendee or vendees is filed in the General Land Office after having been duly recorded in the proper county, the Commissioner and Treasurer shall credit his account with the value of the land sold, and they shall open up new accounts with the original purchaser and such vendee or vendees, and

the Commissioner of the General Land Office shall patent said land to the owners thereof in quantities of forty acres or multiples thereof: Provided, that when any of such land is situated within three miles of a county seat it may be patented in twenty acre tracts.

Sec. 14. The Commissioner of the General Land Office is hereby authorized to patent in quantities of not less than one nor more than five acres any of the vacant and unappropriated public domain of Texas or any of the lands mentioned in this act as sites for cemeteries, churches or school houses. When the land is desired as a location for a school house, the patent shall issue to the county judge of the proper county and his successors in office in trust for that purpose; and when desired for a church house or a cemetery, it shall be issued to trustees designated by those requesting the patent. If the land has been previously sold by the State and not patented, the owner thereof shall execute a deed therefor to the county judge or trustees as the case may be, and cause the same to be recorded in the office of the county clerk of the proper county, and to be filed in the General Land Office, and shall be entitled to credit on his account with the State for the value therefor. Except in case of vacant land the value of the land shall be deposited with the State Treasurer, and in all cases the patent fees shall be paid to the Commissioner of the General Land Office before patent issues. Such land shall be taken from the margin of a tract or section or of a subdivision thereof, as the case may be.

Sec. 15. The Commissioner of the General Land Office shall retain in his custody as records of his office all applications, affidavits, obligations and all other papers relating to the sales of said lands, and shall cause to be kept accurate accounts with each purchaser. All purchase money due upon lands, as well as accrued interest, and all other moneys arising from the sales or leases of said lands shall be paid by the purchaser or lessee direct to the Treasurer of the State, who shall cause an accurate account to be kept with each purchaser, and who shall execute duplicate receipts for all sums of money paid

to him under the provisions of this act, one of which receipts shall be delivered to the purchaser or his agent, and the other transmitted to the Commissioner of the General Land Office.

Sec. 16. The Commissioner of the General Land Office shall adopt such regulations for the sale of the timber on the timbered lands as may be deemed necessary and judicious. Such timber shall not be sold for less than five dollars per acre, cash, except in such cases as the Commissioner may ascertain by definite examinations by an approved agent appointed by him for that purpose, to be paid by the purchaser, to be sparsely timbered or containing timber of but little value, in which case he may sell the timber on such sections or part of sections at its proper value: Provided, such timber is sold at not less than two dollars per acre. The purchaser shall have five years from the date of his purchase within which to remove the timber therefrom, and in case of failure to do so, such timber shall thereby be forfeited to the State without judicial ascertainment: Provided, that all timbered lands from which the timber has been cut and taken off may be placed on the market and sold as agricultural or grazing lands, according to the classifications to be made by the Land Commissioner: Provided, that the purchaser or his vendees of any such timber shall have the right to purchase the land upon which such timber so purchased is situated at two dollars per acre, cash, at any time before the expiration of five years from date of purchase of timber under the provisions of this act.

Sec. 17. The public lands and all lands referred to in the several funds mentioned in this act shall be leased by the Commissioner of the General Land Office under the provisions of this act. All lands classified as agricultural and all lands containing permanent water thereon shall be leased for a term of five years or less at not less than three cents per acre per annum, and all lands classified as pasture or dry grazing lands shall be leased for a term of not more than ten years at not less than two cents per acre per annum, which rental shall be paid yearly in advance, the first payment to be made at the time the lease contract is entered into. If at the termination of any lease the lands covered thereby are still for lease the lessee thereof shall have the preference right

to again lease such lands theretofore leased by him upon the terms and at the prices then fixed by law. All leases shall be executed under the hand and seal of the Land Commissioner and delivered to the lessee or his duly authorized agent, and such lease shall not take effect until the first annual rental is paid, and such lease thereof duly filed for record in the clerk's office of the proper county, and it shall not be necessary for the Commissioner to acknowledge such lease contract so signed and delivered; and all leases under the provisions of this act shall be advertised by the Commissioner in such manner as he may think best, and let to the highest responsible bidder in such quantities and under such regulations as he may think to the best interest of the State, not inconsistent with the equities of the occupant. All bids and offers to lease may be rejected by him prior to signing the lease contract, for fraud or collusion, or other good and sufficient cause.

Sec. 18. Any person desiring to lease any portion of the lands belonging to any of the funds mentioned in this act shall make application in writing to the Commissioner of the General Land Office, specifying and describing the particular lands he desires to lease, and thereupon the Commissioner, if satisfied that the lands applied for a : not in immediate demand for purposes of actual settlement, shall notify the applicant in writing that his proposition to lease is accepted, and thereupon he shall execute and deliver to the lessee, in the name and by the authority of the State of Texas, a lease of said land for such term as may be agreed upon, and deliver the same to such lessee when satisfied that the lessee has paid to the Treasurer of the State the rent for one year in advance. No lands which are now or may hereafter be classified as grazing or pasture lands shall be subject to sale, nor shall the possession thereof by the lessee be disturbed during the term of such lease, except as herein provided, so long as the rents are paid promptly in advance each year, as required by this act. Any actual settler upon any of the lands mentioned in this act, being the head of a family, shall have the right to buy at any time not more than three additional sections of strictly pasture lands, notwithstanding any lease thereof, unless by some other actual

settler; the head of a family, leasing not more than three sections. Whenever any leaseholder has leased from the State of Texas exceeding ten sections, any actual settler, being the head of a family, shall have the right to lease within a radius of five miles of the land occupied by him not exceeding three sections of the land held by such larger leaseholder, but shall not be allowed thereby to reduce the larger leasehold to less than ten sections: Provided, that any man not the head of a family shall have this preference right to lease three sections after having placed two hundred dollars worth of improvements on the section purchased by him: Provided, that in all cases where the actual settler having purchased one section of land is permitted by the provisions of this section to buy or lease additional lands, and thus terminate the lease of the larger leaseholder, he shall be required to so select such additional lands sought to be purchased or leased by him as that by an exchange of lands, section for section and acre for acre, of like quality and class with the larger leaseholder, he can secure the quantity of land he desires to purchase or lease in a solid body; and in case the larger leaseholder desires to do so the actual settler so purchasing or leasing the additional lands in this section mentioned shall make such exchange with him, and shall be required to fence the same separate and apart from the lands of the larger leaseholder; but in no case shall the actual settler be allowed to purchase or lease the lands and terminate the lease of the larger leaseholder under the provisions of this section upon which there is a permanent or artificial water supply; and in no case shall such actual settler be permitted to so select such additional lands for purchase or lease as that by an exchange of lands with the larger leaseholder such larger leaseholder will be required to give in exchange any lands upon which there may be improvements of the value of two hundred dollars. In case the larger leaseholder does not desire to exchange lands, as herein provided, with the actual settler, or upon request made by such actual settler refuses to do so within a reasonable time, then he shall not be required to fence his land, but may turn loose inside of any inclosure in which his lands may be situated not more than one head of cattle or horses, or in lieau thereof four head of sheep or

goats, for every ten acres of land so purchased or leased by him: Provided further, that nothing herein shall be construed so as to prevent either lessee from fencing his own land from the other if he should desire to do so, or to require the small leaseholder to fence his lands at all unless the large leaseholder shall have his leasehold fenced: And provided further, that nothing in this section shall be so construed as to permit any actual settler, either by purchase or lease, or by both, to terminate the lease of the larger leaseholder upon more than four sections: And provided further, that north of a line extending west from the southeast corner of Callahan county to the southeast corner of Martin county; thence north to the south line of Lynn county; thence west to the southwest corner of Lynn county; thence north to the south line of Castro county; thence west to the line of New Mexico, the settler exercising the preference right herein given to buy or lease within the enclosure of another may so buy or lease any lands except a section on which there are improvements of the value of two hundred dollars, or on which there is a permanent artificial water supply, and shall not be required to enclose his lands separate from the lands of the larger leaseholder unless he can obtain the full amount of four sections in a solid body, or unless the same can be secured in a solid body by exchange of lands for the term for which he leases, section for section or acre for acre, with the larger leaseholder; and in all cases where he is not required by the provisions of this act to enclose his lands he may turn loose not more than one head of horses or cattle, or in lieu thereof four head of sheep or goats, for every ten acres of land purchased or leased by him and unenclosed. Each violation of the provisions of this act which restricts the number of stock that may be turned loose on lands leased from the State shall be an offense, and the offender, on conviction, shall be punished by fine of one dollar for each head of stock he may so turn loose, and each thirty days violation of the provisions of this section shall constitute a separate offense. Any agricultural land that may be leased by an actul settler shall be subject to sale and settlement, but in case his lease does not embrace more than three sections, only on condition that the purchaser enclose with

posts and at least two wires the land purchased by him separate from the land held by the lessee, and failure to so enclose it within three months from the date of the purchase shall be sufficient cause to authorize the Commissioner to cancel the contract of purchase and reinstate the lease. In all cases where the lease is terminated under any of the provisions hereof, before the expiration of the term of lease, the lessee shall have a pro rata credit upon his next year's rent, or the money refunded to him by the Treasurer, as he may elect. On the expiration of his lease or its termination under any provision of this section the lessee shall have the right for a period of sixty days to remove any or all the improvements he shall have placed upon the leased premises.

Sec. 19. Any person desiring to lease any portion of the lands aforesaid on which no permanent water supply exists, shall notify the Commissioner of the General Land Office in writing that he desires to lease lands, specifying and describing them, provided he can obtain the necessary supply of water by boring or otherwise, and that he will within ninety days lease said lands, provided such water supply can be obtined; he shall also make and file with the Commissioner of the General Land Office his bond, with good and sufficient personal security in a sum equal to one year's rental of the quantity of land applied for, payable to the State of Texas, conditioned that he will diligently and in good faith try to secure water on such land during such ninety days, and if secured will lease the designated lands for the term prescribed herein, and thereupon the Commissioner shall for such ninety days withhold the lands thus designated from lease to any other person; within or at the expiration of said ninety days and annually thereafter such applicant to lease shall pay to the State of Texas, in advance, one year's rental of the land applied for by him, on satisfactory proof of which payment the Commissioner shall execute and deliver to the lessee a lease of the said lands, signed by himself officially and attested by the seal of the Land Office, together with which he shall deliver up the bond of said lessee, marked "Satisfied." If the said lessee shall fail to apply for his lease and make the payment aforesaid within said ninety days, and shall

also within said ninety days fail to make proof to the satisfaction of the Commissioner of the General Land Office within that time that he has in good faith and diligently used proper means and expended proper efforts to secure a water supply on such land and failed, then and in that case the Commissioner shall mark such bond "Forefeited," and shall deliver the same to the Attorney General of the State, who shall at once cause the said bond to be sued upon and collected; and such collection shall become a part of the available school fund. The penalty stated in such bond is hereby declared to be liquidated damages, and judgement for that sum shall in all cases be recovered by the State. Proof satisfactory to the Commissioner of the General Land Office that proper, suitable and diligent effort had been made by such applicant to secure water, and that sufficient water could not be secured, shall relieve the principal and sureties on said bond from all responsibility therein, and it shall be marked "Satisfied" by said Commissioner and delivered to the principal therein. No lease of less than four sections of unwatered pasture lands shall be made unless such number includes all unleased land in that vicinity belonging to the several funds mentioned in this act. Lessees or their vendees who shall have at their own expense secured water on their leaseholds in accordance with the provisions of this section shall, at the expiration of their lease contract, have the right to a renewal of their leases for another term of five years at the price then provided by law, by giving sixty days written notice to the Commissioner, as provided in the preceding section.

Sec. 20. All lessees from the State of lands named in this act, who are one year or more in arrears on their contracts for rent, shall have the right for the period of four months from the time this act shall go into effect, but not longer, within which they may execute and deliver to the Commissioner of the General Land Office their respective obligations in writing, with personal security satisfactory to the Commissioner, for the respective sums of money then owing by them to the State; and on delivery of such obligation to the Commissioner and the cash payment of one year's rental

in advance, they shall have the right to have their lease contracts cancelled, and may lease such lands anew under this act. Such obligation shall bind such lessees to pay said sums of money, one-third in one year, one-third in two years, and the remainder in three years from date, and shall draw six per cent interest per annum, payable annually; and thereupon the Commissioner shall balance their accounts on the books of his office and cancel and deliver up their old leases and make to them new leases under this act. All lessees who are not in arrears for rent or who shall pay all indebtedness on leases, have the right to surrender their present leases and lease anew their said lands under this act.

Sec. 21. All lessees shall pay the annual rents due for leased lands directly to the Treasurer of the State, who shall execute receipts in duplicate for each payment made by any lessee, one of which receipts shall be delivered to the lessee and the other transmitted to the Commissioner of the General Land Office. The Treasurer shall cause to be kept an accurate account with each lessee and the Commissioner of the General Land Office shall file in his office all applications and other papers relating to leases, and keep a record of all leases made, which papers shall constitute a part of the records of his office.

Sec. 22. If any lessee shall fail to pay the annual rent due in advance for any year within sixty days after such rents shall become due, the Commissioner of the General Land Office may declare such lease cancelled by a writing under his hand and seal of office, which writing shall be filed with the other papers relating to such lease, and thereupon such lease shall immediately terminate, and the lands so leased shall become subject to purchase or lease under the provisions of this act. Such lease shall not be made to original lessees until all arrears are fully paid. During the continuance of all leases, and after forfeiture, the State shall have a lien upon all property owned by thea lessee upon the leased premises to secure the payment of all rents due, which lien shall be superior to all other liens whatsoever; and it shall not be essential to the preservation or validity of such lien that it shall be reserved in the instrument of lease.

Sec. 23. Lessees shall have the right at any time to purchase their leased lands, subject to the limitations as to quantity provided by this act, and at the price and on the conditions herein provided, without reference to any improvements made on such lands by such lessees; and all improvements made by lessees on lands leased by them are hereby declared to be personal property, which may be removed by such lessees on the expiration of their lease contracts; and they shall have sixty days after such expiration in which to remove the same.

Sec. 24. If the Governor shall at any time be informed upon the affidavit of some credible person that any portion of the public lands or the lands belonging to any of the several funds named in this act have been enclosed, or that fences have been erected thereon without authority of law, he is authorized in his discretion to direct the Attorney General to institute suit in the name of the State for the recovery of such lands and damages, and a fee of not less than ten dollars for the attorney when the sum recovered is less than one hundred dollars, and when it is over that sum the fee shall be ten per cent, to be paid by the defendant for the use and occupancy of the same, and the removal of such enclosures and fences and such damages shall not be for a less sum than the amount of all the leases due during such occupancy. Such suit may be instituted in the district court of the judicial district in which the land or any portion thereof (is) situated; and upon application of the Attorney General and without affidavit or bond the court in which suit is pending shall issue a writ of sequestration directed to any sheriff of the State, commanding and requiring such officer to take such land and all property thereon belonging to the person or persons so unlawfully occupying said land into his actual custody, and hold the same subject to the further orders of the court. Such writ of sequestration may be executed by any sheriff of the State into whose hands it may be delivered, and it shall be the duty of any sheriff into whose hands it may come to proceed and execute such writ. The defendant in such suit may replevy as in ordinary cases by giving bond as prescribed by law, and such cases shall have precedence on the docket and stand for trial before

all other cases; and in case judgment is recovered by the State in such suit, the court shall order such enclosures or fences to be removed and shall tax the costs of the suit, if any, against the defendant; and all property found upon the land belonging to the defendant, not exempt from execution, shall be liable to the payment of such costs and damages in addition to the personal liability of the defendant. Appeals may be prosecuted from all judgments in such cases as in ordinary cases, except that the State shall not be required to give bond to perfect its appeal, and such cases on appeal shall have precedence over all other cases. If any person shall make a lease contract, and after the same is enclosed by fence shall for any cause decide not to continue payment of his lease, either in whole or in part, he shall give public notice by publication in any local paper having the largest circulation, for at least sixty days before the time in which his next annual payment shall become due, that he will not continue his lease after the year for which payment is made, and shall also state the number and block of the land which he will not lease inside his enclosure, if he only intends to surrender a part of his lease, and shall post and keep posted for said sixty days notices on all the gates of his pasture of such intention; then, and then only, he shall not be subject to the suit nor be liable for the damages provided for in this section.

Sec. 25. It shall be unlawful for any person to fence, use, occupy or appropriate by herding or line riding, any portion of the public lands of the State, or of the lands belonging to any particular fund specified in this act, without having first obtained a lease of such lands in acordance with the provisions of this act. Any person, whether owner of stock, manager, agent, employee or servant, who shall fence, use, occupy or appropriate by herding or line riding any portion of such lands without a lease thereof, shall be deemed guilty of a misdemeanor, and shall, upon conviction, be fined not less than one hundred nor more than one thousand dollars, and in addition thereto shall be imprisoned in the county jail for a period of not less than three months nor more than two years. Each day of such fencing, occupying, using or

appropriating by herding or line riding shall be deemed a separate offence, and any person so offending may be prosecuted by indictment or information in the proper court of the county where any portion of the land lies, or to which it may be attached for judicial purposes, or in the county of Travis, and jurisdiction of such offences is hereby vested in said courts; and in case any indictment or information is preferred or filed against a non-resident of this State for a violation of this article, it shall be the duty of the Governor to demand the extradition of the defendant from the proper officer of any State or Territory where he may be found, in order that he may be brought to trial. "Fencing," within the meaning of this article, is the erection of any structure of wood, wire or both, or any other material intended to prevent the passage of cattle, horses, mules, asses, sheep, goats or hogs, whether the same shall enclose lands on all sides or be erectead on one or more sides. Any appropriation of land belonging to any particular fund specified in this act or of the public lands of this State, without having first obtained a lease thereof, by fencing of any kind, or by enclosures consisting partly of fencing and partly of natural obstacles or impediments to the passage of live stock, shall be deemed an unlawful appropriation punishable as provided in this article for appropriating such lands, and each day said land is appropriated shall be deemed a separate offense.

Sec. 26. The Commissioner of the General Land Office may withhold from lease any agricultural lands necessary for purposes of settlement; and no agricultural lands shall be leased if in the judgment of the Commissioner they may be in immediate demand for settlement, but such lands shall be held for settlement and sold to actual settlers only under the provisions of this act; and all sections or fractions of sections in all counties organized prior to the first day of January, 1875, except El Paso, Pecos and Presidio counties, which sections are detached and isolated from other public lands, may be sold to any purchaser except to a corporation, without actual settlement, at not less than two dollars per acre, upon such terms as the Commissioner of the General Land Office may prescribe.

Sec. 27. All laws and parts of laws in conflict with this act are hereby repealed.

Sec. 28. The inadequate provisions under the present law for support of the public free schools and the necessitous condition of the available school fund creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended, and that this act take effect and be in force from and after its passage, and it is so enacted."

Chapter 129, Act of May 19, 1897:

"Section 1. Be it enacted by the Legislature of the State of Texas: That Articles 4218d and 4218i, Chapter 12a, Title 87, of the Revised Civil Statutes of the State of Texas be and the same are hereby repealed, and that Articles 4218ff and the same are hereby repealed, and that Articles 4218ff and 4218fff be added thereto, and Articles 4218e, 4218f, 4218h, 4218y of said chapter and title be amended so as to hereafter read as follows:

Article 4218e. The commissioner of the general land office may, from time to time, as the pubilc interest may require, classify any or all of the lands belonging to the several funds mentioned in this chapter that have not been heretofore classified, upon such facts as may be satisfactory to him, designating the same as agricultural, grazing or timbered land, according to the fact in the particular case; and he may prescribe such regulations in relation thereto as he may deem necessary to secure a correct classification. He may also reclassify any lands heretofore erroneously classified, upon the official certificate of the commissioners' court of the county in which said land is situated, or of the county to which such county is attached for judicial purposes, certifying what the proper classification should be, said certificate to be signed by the entire commissioners' court, including the county judge, or upon such other evidence as may be satisfactory to the commissioner.

Article 4218f. When any portion of said land has been classified to the satisfaction of the commissioner of the

general land office, under the provisions of this chapter or former laws, such lands shall be subject to sale, but to actual settlers only, except where otherwise provided by law, and in quantities of not less than eighty acres or multiples thereof, nor more than four sections containing six hundred and forty acres, more or less; provided, that the purchaser shall not include in his purchase more than two sections of agricultural land; and provided, that where there is a fraction less than eighty acres of any section left unsold, such fraction may be sold. Any bona fida purchaser who has heretofore purchased or who may hereafter purchase any lands as provided herein shall have the right to purchase other lands in addition thereto; provided, that the total of his purchases shall not exceed four sections, and that it shall not include more than two sections of agricultural land, upon his making oath that he is not acting in collusion with others for the purpose of buying the land for any other person or corporation, and that no other person or corporation is interested in the purchase thereof. And if he or his vendor has already resided upon his home section for three years, or when he or his vendor, or both together, shall have resided upon it for three years, the additional lands purchased may be patented at any time. In all cases where a settler purchases more than one section the lands in excess of one section so purchased must be situated within a radius of five miles of the land occupied by him. Where any of the lands referred to in this act have been sold prior to July 30th, 1895, in quantities greater or less than forty acres or multiples thereof, and are in good standing as to interest payments, they may be patented in such quantities. In any cases where lands have been forfeited to the State for the non-payment of interest, the purchasers or their vendees may have their claims reinstated on their written request, by paying into the treasury the full amount of interest due on such claim up to the date of reinstatement; provided, that no rights of third persons may have intervened. In all such cases the original obligations and penalties shall thereby become as binding as if no forfeiture had ever occurred.

Article 4216ff. When any purchaser buys and settles upon a section or part of a section of school lands, and buys, either

at the same time or subsequently, other lands in addition thereto, a forfeiture for any legal cause of the part on which he resides, at any time before the three years residence thereon has been completed, shall work a forfeiture of the entire purchase, except such part thereof as he may have previously sold to another. But after the three years residence has been completed, a forfeiture of the home tract shall not of itself work a forfeiture of the other tract or tracts. In case of sale of any of said tracts before the three years residence has been completed, the vendee must reside thereon until he has completed the three years occupancy from the date of the original purchase, and a failure to do so shall subject his land to forfeiture; but in case of sale of any of said tracts after the completion of the three years residence, the vendee shall be exempt from the condition of settlement and occupancy.

Article 4218fff. Any actual, bona fide owner of and resident upon any other lands contiguous to said lands, or within a radius of five miles thereof, may also buy any of the aforesaid lands, but in such case a failure to reside upon either his other lands or upon a part of the additional lands so purchased by him, so as to make his ownership and occupancy thereof continuous for three years, shall work a forfeiture of such additional lands so bought from the State, unless he shall have sold his land to another who may and does complete a three years continuous ownership and occupancy of and residence upon his said lands as above stated and as is herein required of actual settlers.

Article 4218h. All agricultural lands belonging to the public free schools and the several asylum funds shall be sold at not less than one dollar and fifty cents per acre; and all grazing lands shall be sold at not less than one dollar per acre; and all timbered lands shall be sold at not less than five dollars per acre. By timbered lands is meant lands valuable chiefly for the timber thereon. Provided, that the owner of land which is in fact agricultural, purchased under former laws, and which land is not subject to forfeiture at the time this law goes into effect, shall not be permitted, in case said land is forfeited, to purchase said forfeited land from the State for

a less price per acre than the contract price under the former sale.

Article 4218s. Any person desiring to lease any portion of the lands belonging to any of the funds mentioned in this chapter, shall make application in writing to the commissioner of the general land office, specifying and describing the particular lands he desires to lease, and thereupon, the commissioner, if satisfied that the lands applied for are not in immediate demand for purposes of actual settlement, shall notify the applicant in writing that his proposition to lease is accepted, and thereupon he shall execute to the lessee in the name and by the authority of the State of Texas a lease of said land for such time as may be agreed upon, and when satisfied that the lessee has paid to the treasurer of the State the rent for one year in a advance, shall deliver said lease to the clerk of the county court of the county in which the land is situated or of the county to which said county is attached for judicial purposes, and it shall be the duty of the clerk to record in a well bound book, to be kept in his office, open to public inspection, a memorandum or abstract of said lease, sh wing the number of the survey or surveys leased, the name of the original grantee, the amount leased, the name of the lessee, the date of the lease, and the number of years it has to run; and for entering said memorandum the clerk shall be entitled to a fee of twenty-five cents. Upon the payment of said fee, the clerk shall deliver the lease to the lessee; and no other record of leases hereafter made shall be required except said memorandum.

All lease contracts heretofore made and not recorded, shall be filed for record with the clerk of the proper county, within three months after this act takes effect, and if any lessee shall fail to have his unrecorded lease so filed for record within said time, the Commissioner of the General Land Office shall disregard said lease, and award the land to any other applicant accompanying his application with the certificate of the clerk that no lease of said land is of record in his office. When any of such leases are filed for record, the clerk shall make the memorandum or abstract above provided for. All lands

which may be leased shall be subject to sale at any time except where otherwise provided herein. This provision in regard to the sale of leased lands shall apply to leases heretofore made, as well as to those hereafter to be made. Any section or part of a section which may be leased, shall not be sold, nor shall the lessee be disturbed in his possession thereof during the term of his lease, in the following cases:

1. When the lessee has actually settled upon such section, or part of a section, and erected thereon his residence and substantial improvements for permanent settlement.

2. When he has placed on such section or part of a section improvements of the value of two hundred dollars.

3. When the aggregate of the land owned by a settler and leased by him does not exceed one section.

Any lands which may be leased south and west of the line herein designated shall not be sold during the term of the lease until otherwise provided by law; provided, the sections leased by any one party are not so selected as to detach sections which are thereby left unleased. Said line begins at the northwest corner of Yoakum County; thence East, to the northeast corner of Kent County; thence South to the north line of Fisher County; thence West, to the northeast corner of Scurry County; thence south, to the north line of Coke County; thence East, to the northwest corner of Runnels County; thence South, to the southwest corner of Runnels County; thence East, to the northwest corner of Concho County; thence South, to the southwest corner of Concho County; thence East, to the southeast corner of Concho County; thence South, to the southwest corner of McCulloch County; thence East, to the southeast corner of McCulloch County; thence South, to the southwest corner of San Saba County; thence East, to the northwest corner of Llano County; thence South, to the southeast corner of Mason County; thence West, to the northwest corner of Gillespie County; thence South, to the southwest corner of Gillespie County; thence East, to the northeast corner of Kerr County; thence South, to the southeast corner of Bandera County; thence West, to

the northeast corner of Uvalde County; thence South, to the southwest corner of Medina County; thence East, to the northeast corner of Frio County; thence South, to the northeast corner of La Salle County; thence East, to the northeast corner of McMullen County; thence South, to the southeast corner of McMullen County; thence East, to the Nueces river; thence down said stream to its mouth: Except in that portion of the State South and West of the above delineated line, any actual settler shall have the right to lease within a radius of five miles of the land occupied by him, not exceeding three sections of the land held by a lease holder who is leasing more than ten sections from the State, but shall not be allowed thereby to reduce the large leasehold to less than ten sections. In all cases where the lease is terminated under any of the provisions of this act before the expiration of the term of lease, the lessee shall have a pro rata credit upon his next year's rent, or the money refunded to him by the treasurer, as he may elect. On the expiration of his lease, or its termination under any provision of law, the lessee shall have the right for the period of sixty days to remove any or all improvements he shall have placed upon the leased premises. No purchaser or other person than the lessee shall be permitted to turn loose within such lessee's inclosure more than one head of horses, mules or cattle, or in lieu thereof four head of sheep or goats, for every ten acres of land so purchased, owned or controlled by him and uninclosed. Each violation of the provisions of this act, which restrict the number of stock which may be turned loose in such inclosure, shall be an offense, and the offender, on conviction, shall be punished by a fine of one dollar for each head of stock he may so turn loose, and each thirty days' violation of the provisions of this section shall constitute a separate offense.

Article 4218y. The Commissioner of the General Land Office may withhold from lease any agricultural lands necessary for the purpose of settlement, and no agricultural lands shall be leased, if, in the judgment of the Commissioner, they may be in immediate demand for settlement, but such lands shall be held for settlement, and sold to actual settlers only, under the provisions of this chapter; and all sections and fractions

of sections, in all counties organized prior to the first day of January, 1875, except El Paso, Presidio and Pecos Counties, which sections are isolated and detached from other public lands, may be sold to any purchaser, except to a corporation, without actual settlement, at one dollar per acre, upon the same terms as other public lands are sold under the provisions of this chapter.

Sec. 2. The fact that the existing law makes no provision for a reclassification of lands which have been erroneously classified, thus working great injustice in many cases, and that the opinion has been given out from the attorney general's office that no lands are subject to sale during the term of the lease, thus preventing settlement, create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended, and that this act take effect and be in force from and after its pasage, and it is so enacted."

Act Approved April 19, 1901

SECTION 1. That it shall be the duty of the Commissioner of the General Land Office to notify in writing the county clerk of each county the classification and valuation fixed upon each section of land in his county, and in each county attached to it for judicial purposes, and said Commissioner of the General Land Office shall make forthwith a correct and revised list for each county of all unsold lands therein, and he shall forward the same by registered letter to the county clerk of the county for which said list was made, or to the county clerk of the county to which said county is attached for judicial purposes, and the Commissioner of the General Land Office shall, on application therefor, furnish any citizen a copy of said list for as many counties as applied for, making a reasonable charge for such list or lists, and the Commissioner of the General Land Office shall file the return receipt for said registered letter among the papers of his office and keep the same for future reference; and said Commissioner of the General Land Office shall also notify said clerk of each and every sale as soon as said sales are made. Upon receipt of

said list, or any notice required to be given under the provisions of this act, the county clerk receiving the same shall forthwith file and record said list in a well bound book to be kept for that purpose, and thereafter when notified of the sale of any section of land therein described he shall enter opposite the description of the land so sold the name of the purchaser and the date when sold; and the said list so furnished said clerk, and said book shall be considered public records and open to public inspection, and it is hereby made the duty of the county clerk to exhibit said book and the records to any person who shall apply to him therefor. For the purpose of furnishing the several counties in this State and the clerks thereof with a revised list of all the unsold lands in this State, as provided in this act, the Commissioner of the General Land Office is hereby authorized to employ four expert clerks at a salary not to exceed one hundred dollars per month each; provided, their services shall de discontinued when said list shall have been made, and provided the employment shall not exceed six months. The sum of twenty-four hundred dollars, or so much thereof as may be necessary, is hereby appropriated, for the purpose of carrying into effect the provisions of this act.

In case any county clerk of any county in this State after the receipt of the list of unsold lands or notices concerning the same hereinbefore provided to be sent to him by the Commissioner of the General Land Office shall fail to file, record or exhibit the same as hereinbefore provided, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than one hundred dollars nor more than five hundred dollars.

Sec. 2. Any person desiring to purchase school or asylum land shall make a separate application for each tract applied for, addressed to the Commissioner of the General Land Office, describing the lands sought to be purchased, which application shall be accompanied with the affidavit of the applicant in effect that he desires to purchase the land for a home and has in good faith settled thereon, except where otherwise provided by law; and he shall also swear that he is not acting

in collusion with others for the purpose of buying land for any other person or corporation, and that no other person or corporation is interested in the purchase thereof. He shall accompany said application with his obligation to the State, duly executed, binding the purchaser to pay to the State on the first day of November of each year thereafter until the whole purchase is paid one-fortieth of the aggregate price with interest at the rate of three per cent per annum on the whole unpaid purchase money, which interest shall also be payable on the first day of November of each year. Said application, oath and obligation shall be filed in the office of the county clerk of the county in which the land is applied for or a part thereof is situated, or of the county to which said county is attached for judical purposes; but the clerk shall not file such application until the applicant shall have deposited with him the first payment of one-fortieth of the aggregate purchase money for the particular tract of land. Upon the receipt of said application and first payment, the county clerk shall endorse officially on the application the day and the hour of filing, and record the same in full in a well bound book to be kept by him for that purpose, and shall also note on his record of unsold school lands, the name of the applicant and the date the application is filed and as soon as the application is recorded, the book and page where recorded. The county clerk shall record the application and obligation without delay, recording all applications in the order in which they are filed, and shall forthwith transmit them when recorded to the Commissioner of the General Land Office, and the first payment to the State Treasurer. All applications shall take effect from the time they are filed in the office of the county clerk of the proper county; and for filing and recording each application and noting the name of the applicant and date of application on the record of unsold lands and transmitting it to the Commissioner of the General Land Office and the first payment to the State Treasurer, and all other services in connection therewith, the clerk shall be entitled to a fee of one dollar for each application, to be paid by the applicant. Any failure or refusal of the county clerk to perform any duties required in this section shall be an offense and upon conviction he shall be fined not

less than one hundred dollars nor more than five hundred dollars.

Sec. 3. The Commissioner of the General Land Office is hereby prohibited from selling to the same party more than four sections of land, and all applications to purchase land shall also disclose the prior lands purchased by the applicant from the State, if any, since the taking effect of this act, and the residence of the applicant at said time, and if it appear therefrom or from the records in the Land Office that said applicant has already purchased land aggregating four sections since the taking effect of this act, his application shall be rejected; provided, this shall not apply to sale made to a purchaser and afterwards canceled as invalid for some reason other than abandonment and where the purchaser himself was not at fault. Every purchaser shall be required within three years after his purchase to erect permanent and valuable improvements on the land, purchased by him, which improvements shall be of the reasonable market value of three hundred dollars. If any purchaser shall fail to reside upon and improve in good faith the land purchased by him as required by law, he shall forfeit said land and all payments made thereon to the State, to the same extent as for the non-payment of interest, and such land shall be again upon the market as if no such sale and forfeiture had occurred, and all forfeitures for non-occupancy shall have the effect of placing the land upon the market without any action whatever on the part of the Commissioner of the General Land Office; and if any purchaser shall be forced to yield possession of the land purchased by him from the State on account of any writ or other judicial precess issued from a court of competent jurisdiction, or be compelled to temporarily yield his possession from a wellgrounded fear of death or serious bodily injury, such absence shall not work the forfeiture provided by law for non-occupancy; but no writ of injunction shall issue in any case involving the title or possession of lands herein referred to, where the applicant has an adequate remedy at law by sequestration or otherwise.

Sec. 4. Any person desiring to lease any portion of the lands belonging to any of the funds mentioned in this act shall

make application in writing to the Commissioner of the General Land Office, specifying and describing the particular lands he desires to lease; and thereupon the Commissioner, if the lands applied for are subject to lease, and not in immediate demand for actual settlement, shall notify the applicant in writing who first files written application therefor that his porposition to lease is accepted, and thereupon he shall execute to the lessee in the name and by the authority of the State of Texas a lease of said lands for such time as may be agreed upon, not to exceed five years; and when satisfied that the lessee has paid to the Treasurer of the State the rent for one year in advance, he shall deliver said lease to the clerk of the county court of the county in which the land is situated, or of the county to which said county is attached for judicial purposes, and it shall be the duty of the clerk to record in a well bound book kept in his office, open to public inspection a memorandum or abstract of said lease, showing the number of the survey or surveys leased, the name of the original grantee, the amount leased, the name of the lessee, the date of the lease and the number of years it has to run; and for entering said memorandum the clerk shall be entitled to a fee of twenty-five cents. Upon payment of said fee the clerk shall deliver the lease to the lessee and no other record of leases hereafter made shall be required except said memorandum. When any of such leases are filed for record the clerk shall make the memorandum or abstract above provided for. All lands which may be leased shall be subject to sale at any time, except where otherwise provided herein. This provision in regard to the sale of leased lands shall apply to leases heretofore made as well as to those hereafter to be made. Any section or part of a section which may be leased shall not be sold except to the lessee, nor shall the lessee be disturbed in his possession thereof during the term of his lease, when he has placed on such section or part of a section improvements to the value of two hundred dollars. In the following named counties lands heretofore leased not be subject to sale until said leases expire, except as herein provided, towit: Kent, Garza, Lynn, Scurry, Borden, Dawson, Mitchell, Martin, Howard, Coke, Sterling, Glasscock, Tom Green, Irion,

Schleicher, Menard, Mason, Uvalde, Frio, Kerr and Bandera, provided, that after the expiration of five years from the date this act takes effect all lands now under lease in any of the counties above named shall be subject to sale regardless of the fact as to whether or not the lease on the land has expired.

Sec. 5. The following counties shall constitute the absolute lease district, towit: El Paso, Jeff Davis, Presidio, Brewster, Reeves, Pecos, Loving, Winkler, Ward, Yoakum, Terry, Gaines, Andrews, Ector, Midland, Upton, Crane, Crockett, Sutton, Val Verde, Edwards, Kinney, Maverick, Zavala, Dimmit, La Salle, McMullen, Webb, Duval, Nueces, Kimble, Zapata, Starr, Hidalgo and Cameron. All tracts of land lying partly inside and partly outside of the absolute lease district shall be considered for the purpose of sale and lease, as being wholly without said district. And lands situated in the absolute lease district which may be leased shall not be sold during the term of the lease, except as provided herein. On the expiration of any lease in the absolute lease district the lands shall remain subject to sale for a period of sixty days, except where there are improvements on a section of the value of two hundred dollars or more, and if it has been previously classified and valued by the Commissioner of the General Land Office, and notice given to the county clerk, it shall not be necessary to give the clerk any further notice in order to put the land on the market, but it shall be considered as already on the market and subject to sale. During said period of sixty days the Commissioner of the General Land Office shall suspend action upon any application to lease said land, and shall award it upon any legal application to purchase made during said time. And that the party purchasing any of said lands, whether inside or outside of the absolute lease district, within the inclosure of another, shall not turn loose any stock within the inclosure until he shall have provided sufficient water for the stock so turned loose, and any violation of this provision shall be an offense, and upon conviction the party so offencing shall be fined one dollar for each head of stock so turned loose, and each thirty days violation shall constitute a separate offense. If no application

to purchase has been filed in the proper county clerk's office within sixty days after the expiration of the lease, then the former lessee shall have a preference right over any one else for thirty days thereafter to re-lease such lands or any part thereof, but his lease shall run from the expiration of his old lease. In all cases where the lease is terminated under any of the provisions of this act before the expiration of the term of lease, the lessee shall have a pro rata credit upon his next year's rent or the money refunded to him by the Treasurer as he may elect. On the expiration of his lease or its termination under the provisions of law, or by a final judgment of any court of competant jurisdiction, the lessee shall have the right for the period of sixty days to remove any or all improvements he shall have placed upon the leased premises. No purchaser or other person than the lessee shall be permitted to turn loose within such lessee's inclosure more than one head of horses, mules or cattle, or in lieu thereof, four head of sheep or goats, for every ten acres of land so purchased, owned or controlled by him and uninclosed. Each violation of the provisions of this act which restricts the number of stock which may be turned loose in such inclosure shall be an offense, and the offender, on conviction, shall be punished by fine of one dollar for each head of stock he may so turn loose, and each thirty days' violation of the provisions of this section shall constitute a separate offense. The Commissioner of the General Land Office is hereby prohibited from renewing any lease before its expiration, as shown on the face of the original lease contract; and no lease contract shall be canceled, except in cases where the land has been or may be sold as provided by law, or where the lessee fails to pay the annual rental due the State within sixty days from the date it becomes due. And when the lessee shall fail to pay his annual rental within sixty days after it becomes due, the Commissioner of the General Land Office shall cancel said lease and immediately notify the county clerk of the county in which the land, or a part thereof is situated, of the cancellation and the date when canceled, and the clerk shall note the date of cancellation on his lease record, and the land shall be on the market for sale sixty days after said cancellation.

Sec. 6. Any lessee shall have sixty days prior right to purchase lands as an actual settler at expiration of his lease; and provided further that if the sections sought to be purchased have eaech improvements upon them of a permanent nature of the value of five hundred dollars, that then said section or sections need not be situated within the five mile radius as fixed by law, and provided further, that all lands purchased under this act that are not purchased under this preference right herein given lessees shall be situated within the five mile radius now required by law.

Sec. 7. All lands which are now or which may hereafter detached lands shall be sold to actual settlers only on such terms conditions as are now or which may hereafter be provided by law.

Sec. 8. The Commissioner of the General Land Office shall adopt such regulations for the sale of timber on the timbered lands as may be deemed necessary and judicious. Such timber shall not be sold for less than five dollars per acre cash, except in such cases as the Commissioner may ascertain by definite examination by an approved agent appointed by him for that purpose, to be paid by the purchaser, to be sparsely timbered or containing timber of but little value, in which case he may sell the timber on such sections or part of sections at its proper value, provided such timber is sold at not less than two dollars per acre. The purchaser shall have five years from the date of his purchase within which to remove the timber therefrom, and in case of failure to do so, such timber shall thereby be forefited to the State without judicial ascertainment; provided, that all timbered lands from which the timber has been cut and takn off may be placed on the market and sold as agricultural or grazing lands, according to classifications to be made by the Land Commissioner; provided, that upon application of the purchaser or his vendees of any such timber made within five years from the purchase of such timber the Commissioner of the General Land Office shall have said land classified at the expense of the owner of said timber as agricultural or grazing land, and the owner of said timber shall have the right to purchase said land

tribute his proportion of the expenditure required, his interest in the claim shall cease beyond the amount which he may have previously expended thereon and become the property of his co-owners, who may have made the required expenditures. An affidavit by the co-owners of the facts accompanied with the notice given shall, when recorded in the proper county surveyor's office, be sufficient evidence of such delinquency and forfeiture in all interest in such claim. If patent should be applied for on such claim it shall be issued to the owners if the proper evidence of forfeiture of such interest be filed in the land office. This article shall apply only to the claims filed on land containing the minerals named in the preceding article.

Article 34981. If the application and affidavit provided for in Article 3498f are not filed with the proper County Surveyor within ninety days from the date of the first posting and if the application, affidavit, fied notes filing fee and obligation are not filed in the Land Office or the first payment is not paid to the State Treasurer within the sixty days as required in Article 3498f the file and claim thereunder shall be void. If any part of an annual interest or any part of an annual payment of principal remains unpaid for thirty days after it becomes due on any claim, such claims shall be subject to forfeiture by the Commissioner of the General Land Office by an endorsement on the obligation "Forfeited" signed officially by him, and thereupon all payments shall also be forfeited to the fund to which the land originally belonged. All forfeited claims may be reinstated upon written request of one or more owners filed in the Land Office and payment of all interest and principal due; provided, no rights of another has not intervened at date of filing such request in the Land Office. One interested in a claim at the time it was forfeited shall not be eligible to relocate or refile upon the same land for himself or on behalf of any other person, and any such location or attempt to locate by such person shall be wholly void. Whenever any land theretofore covered by a forfeited claim shall be relocated, the locater or locaters and each of them shall make an affidavit that the location is made without any contract or agreement or understanding

of any kind; that none of the parties theretofore owning an interest in the forfeited claim before the relocation have or is to have any interest in the same under the new location. In all other cases where an affidavit is required by this title it may be made by one or more of the parties cognizant of the facts. This article shall apply only to claims filed on land containing the minerals named in Article 3498f.

SECTION 2. Article 3498m, Revised Civil Statutes of 1895 is hereby repealed.

SECTION 3. The fact that persons who file on mineral lands containing gold, silver, cinnabar, lead, tin and copper can work them for five years without paying anything to the fund to which the land belongs and then forfeit it without recourse by the State for what may have been taken out of it, and then the same claim may again be filed on and worked another five years without payment, and so on indefinitely until a valuable mineral deposit may be exhausted to the detriment of the fund to which the land belongs creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read three separate days be suspended, and that this act be placed upon third reading and final passage, and it is so enacted.

Act Approved May 16, 1907

SECTION 1. Sections 5 and 6, Chapter 103, approved April 15, 1905, shall be amended so as to hereafter read as follows:

RIGHTS OF LESSEES.

Sec. 5. An original lessee of a lease executed prior to April 15, 1905, who has never parted with any interest in his lease except by purchase, may purchase out of such lease in whole surveys only, one complement of sections or such part thereof as will make his total purchase since April 19, 1901, not to exceed eight or four sections, according to the county; provided an original lessee who has not heretofore exercised his

at the valuation fixed by said Commissioner on the same terms and conditions as other lands of like classification are sold under the provisions of this chapter.

Sec. 9. That all laws and parts of laws in conflict with this act are hereby repealed.

Sec. 10. The importance of the legislation proposed and the crowded condition of the calendar rendering it improbable that this bill can be read on three several days creates an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended and that this act take effect from and after its passage; and it is so enacted.

Act Approved April 15, 1905

Section 1. Articles 3498f, 3498g and 34981 of the Revised Civil Statutes of 1895 be so amended as to hereafter read as follows, to-wit:

Article 3498f. The locater shall, within three months after the date of posting the required notice, file with the county surveyor of the county in which the land or a part thereof is situated an application in writing for the survey of the claim, giving the name of the claim and such designation of its boundaries and location as to enable the surveyor to identify the land. The application shall be accompanied by a fee of twenty dollars, unless its tender is waived, and also with an affidavit attached thereto that the applicant has found valuable minerals, stating the kind, on the claim, also the date of the first posting of the notice on the claim by the applicant and that the notice has not been post dated nor changed in its date. Upon receiving the application and affidavit and fee the surveyor shall record the application and affidavit and shall forthwith proceed to survey the claim. After the field notes are recorded and a plat of the survey is made by the surveyor, he shall deliver the application and affidavit together with the field notes and plat to the applicant or his agent, who shall forward same to the commissioner of the general land office with one dollar as a filing fee. When the applicant

forwards the papers aforesaid to the commissioner he shall at the same time forward to the State Treasurer one-fifth of the aggregate price of the land as the first payment thereon. The applicant shall also file in the land office with his other papers his obligation to the State for the remaining unpaid purchase money, binding himself to pay to the State of Texas at the State treasury in Austin, Texas, one-fifth of the unpaid purchase price, together with four per cent interest annually after the date of the filing of said papers in the land office, and until the entire purchase price and interest are fully paid. The papers aforesaid shall be filed in the land office within sixty days from the date the application was filed with the county surveyor, and not thereafter. The fee of twenty dollars shall cover all charges by the surveyor in connection with any one claim. A claim filed on under this title for gold, silver, cinnabar, lead, tin or copper, zinc, tungsten, molybdenum and uranium may be paid out in full at any time within five years from the date the papers were filed in the land office. All mineral lands shall be sold at such price as may be fixed by the land commissioner, but in no event shall the same be sold at a price less than twenty-five dollars per acre, nor until he has ascertained approximately their value; provided, that no person, firm or corporation or association of persons shall be permitted to locate or file on more than five claims of twenty-one acres within a radius of five miles. This Article shall apply only to the claims filed on land containing the minerals herein named.

Article 3498g. Upon the failure of any one of the several owners to contribute his proportion of the expenditure required in this article within the necessary time, the co-owner or co-owners who have paid the fees, or interest or principal, may at the expiration of the time in which the payment was to be made and was so made by him, give notice in writing to such defaulting co-owner, or give such notice by publication in a newspaper published in the county where the claim is, if any; if none in such county, then in the newspaper published nearest the mining claim, for at least once a week for ninety days. If after such personal notice in writing or by publication such delinquent shall fail or refuse to con-

right to buy one complement of sections out of one or more leases and should not hereafter desire to do so, may assign one or more leases to a qualified purchaser and his assignee shall have the same right to purchase out of the leases one complement of sections, or such number thereof as the assignor may be qualified to purchase or such number as the assignee may be qualified to purchase; provided that in case the assignment should have been made and acknowledged before an officer authorized to take acknowledgments the assignee may exercise that right as provided for under the Act of April 15, 1905. Only one complement shall be sold out of any lease, including that heretofore sold out of it. One who desires to buy land out of his lease shall first give written notice to the Commissioner of the General Land Office and specify the land he wants to buy not less than sixty days prior to expiration of the lease. The Commissioner shall make or cause to be made an inspection of the land, if he is not already in possession of sufficient information, and appraise same at its reasonable market value, and advise such person and the proper county clerk of the value placed thereon. Thereafter the land shall be subject to sale to the lessee only during the life of the lease. After a lease expires or is cancelled, no one shall have any preference to purchase any land contained therein.

EIGHT SECTION COUNTIES-COMPLEMENT OF LAND.

Sec. 6. One who has not purchased any land since April 19, 1901, may purchase, on condition of settlement, in the counties of Brewster, Crockett, Edwards, El Paso, Jeff Davis, Kinney, Pecos, Presidio, Sutton, Terrell and Val Verde not to exceed eight sections of 640 acres each, more or less, which are wholly within said counties. One who has heretofore or who may hereafter purchase a complement as aforesaid, shall not purchase any more. One who has purchased or may hereafter purchase on condition of settlement four sections of 640 acres each, more or less, wholly or partly within any county other than those hereinabove named since said date, shall not purchase any more on condition of settlement. One who has purchased less than a complement as aforesaid may hereafter purchase

in any county, such number of sections as his lack of a complement in the county of the former purchase bears to a complement in the county of such former purchase. One who has heretofore purchased land on condition of settlement which lies partly within an eight-section county and partly within a four-section county shall be considered for the purpose of future purchase by him as having purchased in a four-section county. Every additional survey applied for shall be situated within five miles of the designated home tract except the survey on which the lessee, who may apply to buy out of his lease, may have placed permanent and immovable improvements of the value of five hundred dollars, need not be within such radius. No survey shall be sold in any county except as a whole, notwithstanding it may be leased in two or more parts.

SEC. 2. Add thereto Sections 6a, 6b, 6c, 6d, 6e, 6f and 6g, as follows:

SETTLEMENT AND RESIDENCE

Sec. 6a. All of the surveyed school land wholly or partly within the counties of Andrews, Brewster, Cameron, Crane, Crockett, Dimmit, Duval, Ector, Edwards, El Paso, Gaines, Hidalgo, Jeff Davis, Kimble, Kinney, La Salle Loving, Maverick, McMullen, Midland, Pecos, Presidio, Reeves, Starr, Sutton, Terrell, Terry, Upton, Uvalde, Val Verde, Ward, Webb, Winkler, Yoakum, Zapata and Zavala shall be sold on condition of settlement as provided by this act and existing statutes, except tracts of one hundred acres or less shall be sold for cash. The land purchased by one either for cash or on deferred payment without condition of settlement shall not be computed against him in his purchase on condition of settlement. Every purchaser on condition of settlement shall in person reside continuously on either the designated home tract or on some portion of the land purchased as additional thereto for three consecutive years next succeeding the date of the award of the home tract, or from the date of the award of the first tract, as additional to a home already owned, as the case may be, including the ninety days allowed to settle. The proof of such

settlement and residence shall be made as now provided by statute.

SALES WITHOUT SETTLEMENT

Sec. 6b. The surveyed school and asylum land and the timber thereon situated wholly within any county other than those named in the preceding section and which is now unsold shall be advertised and subject to sale on November 1, 1907, and not before, and to the one offering the most therefor and in whole tracts only. On said date the said land and timber thereon shall be subject to sale and so remain until sold. The said land shall be sold in whole tracts only without condition of settlement or limit as to quantity and either for cash with the right to patent at once, or for one-fortieth cash with five per cent interest on the deferred payment, together with all the pains and penalties of forfeiture for non-payment as is now or may hereafter be provided by law. When any such purchase is fully paid for the land may be patented. No land on which there is merchantable timber shall be sold until the timber is sold for cash and fully paid for. Should two or more applicants offer the same price for any tract on the same date, the same being the highest price offered, and one should offer full cash payment and another should offer one-fortieth cash payment and balance on time, the application on deferred payment shall be accepted. Such of the land in the counties included within this section as is now sold but which may hereafter become subject to sale shall not be subject to sale until the former sale shall have been cancelled and the land and timber, if any thereon, shall be reappraised by the Commissioner and a date fixed, not more than sixty days from the date of such cancellation, when it may be subject to sale to the one offering the highest price therefor. Notice of such cancellation and reappraisement shall be mailed to the proper county clerk, together with the date when the land and timber, if any, will be subject to sale.

TIMBER AND LAND

Sec. 6c. One who applies to purchase the timber shall file his application in writing in the General Land Office in the manner

now provided for the filing of applications for the purchase of land, and pay to the State Treasurer the full cash payment according to the price offered therefor, but not at a less price than that fixed by the Commissioner. Should two or more persons each apply to purchase the timber and land on the same day and one should offer more for the timber but less for the land than a competitor, then the one offering the highest price for the timber shall have an option for thirty days, as now provided by law for designating home tracts, to take the land at the highest price offered by such competitor. Should the one offering the highest price for the timber not want the land at such highest price, but should want the timber, it shall be awarded to him. Should one who applies for both timber and land offer the highest price for the land, but a lower price for the timber, he shall have an option of thirty days as aforesaid to purchase the land if it should not be purchased by the one who offers the highest price for the timber, but should the one who offers the highest price for the timber and the lesser price for the land not want the land at such high price, nor should he exercise his option by purchasing the timber alone, then the land and timber shall be awarded to the one offering the highest price for the land and next highest price for the timber. The Commissioner shall appraise all timber at its reasonable market value, and it shall not be sold at a price less than that so fixed by him. Should two or more applications for timber alone be filed on the same day, the one offering the most therefor shall be accepted. All timber shall be sold in full tracts. The purchaser of timber without the land shall have the right of ingress and egress upon the land for a period of five years after date of award for the purpose of removing or protecting the timber thereon, and the purchaser shall be entitled to all the timber thereon for that period and no longer. After that time the title to the timber shall revert to the fund to which the land belonged and be again subject to sale by the State unless the land shall sooner be sold and fully paid for and patent issued thereon, and in that event the timber shall revert to the owner of the land. The owners of timber heretofore purchased which has not been removed and the five years in which to remove same or to purchase the land have not expired, but may expire on or before November 1, 1907,

may purchase the land on that date at the price fixed by the Commissioner and without condition of settlement, either for cash or on deferred payment, with five per cent interest as provided in this act for other purchasers without settlement. In case the five years do not expire before said date, only the owner of the timber shall have the right to purchase the land as herein provided at any time prior to the removal of the timber and within the five years allowed in which to remove same. Land on which timber has heretofore been sold and the timber has been or may be removed, or the five years shall have expired and the land not purchased by the owner of the timber, shall not be sold until it is re-classified and reappraised by the Commissioner and a date fixed not more than sixty days after such action for the sale thereof. Notice of such action and date fixed for sale shall be mailed to the proper county clerk.

TRANSFER

Sec. 6d. One who hereafter buys land on condition of settlement shall not sell any part of such purchase prior to one year after date of award of the home tract, nor prior to one year after date of the award of the first additional tract purchased to a formerly acquired home unless the required residence has sooner been completed. After the lapse of the time aforesaid the purchaser may sell all of his land or any part thereof in whole tracts, according to his purchase, to another qualified purchaser, who will become an actual bona fide settler on some part thereof at date of his transfer if the residence is not complete, and such assignee shall complete the residence on the land by continuous residence thereon as required of his vendor, and if the vendor does not sell all of his purchase he shall continue to reside upon his home tract or on some part of that retained until the completion of the residence required of him. A purchaser on condition of settlement under this act, or any former law, who may have the right to sell his land or a part of it, may sell his whole home tract or one or more of his additional tracts as a whole, according to his purchase to another purchaser who owns a designated home tract within five miles of each of such tracts as he may purchase as assignee, and the assignee may take each

of the tracts as additional to his own designated home tract; provided the total tracts so purchased by an assignee prior to the completion of the residence of the vendor, together with the former purchase of the assignee, shall not exceed one complement of sections. In such cases the assignee shall continue to reside in person upon either his formerly designated home tract, or on one of his formerly acquired additional tracts, or on one of his additional tracts purchased as assignee, continuously until the completion of the residence required of him under his former purchase and that of his vendor. No tract hereafter purchased shall be transferred except as a whole prior to the issuance of patent thereon, but should a transfer of less than a whole tract be made after the purchaser has the right to sell in whole tracts under the provisions of this act, such transfer shall not be void, but the owner shall not be substituted as assignee on the records of the Land Office nor recognized on the accounts kept by the State Treasurer. The failure to pay the interest on the whole of such tract shall operate as a forfeiture of ever part thereof.

GENERAL PROVISIONS

Sec. 6e. One who has heretofore or who may hereafter purchase land out of a lease or otherwise, on condition of settlement in the counties named in Section 6a of this act, and fails to settle thereon within the required time, or fails to file in the Land Office his affidavit of settlement within the required time, or fails to comply with the law as to residence on the land, or executes a transfer contrary to the provisions of this act, except those stated in this act as not being void, he shall forfeit the land and all payments made thereon to the fund to which the land belongs and when the Commissioner shall be sufficiently informed of the facts which operate as a forfeiture, he shall cancel the award or sale by noting the act of forfeiture on the obligation and mail notice of that fact to the proper county clerk. Such land shall not be subject to sale again at a less price than the former sale price unless the Commissioner shall have reappraised the land at a less price after noting the act of forfeiture.

All applications for the purchase of land without settlement and either for cash or on deferred payment shall be in writing and accompanied by the affidavit of the applicant that he desires the land for his own benefit and not for any other person or corporation. An application on deferred payment shall be accompanied by the obligation for the balance of the purchase money conditioned as now provided by statute. No application shall be considered if the cash payment is not in the State Treasury as now provided by law. If for any cause an application for land or timber which offers the highest price can not be accepted, those offering the next highest price and filed on same day shall be considered in their order of price until one may be awarded.

All surveys and unsold portions of surveys shall be sold as a whole. All unsurveyed tracts of 640 acres or less shall be sold as a whole, and all tracts of more than 640 acres shall be sold in such tracts as may be required or approved by the Commissioner. No one shall hereafter have any preference to purchase any unsurveyed land except as provided in this act for original lessees out of leases.

All tracts containing one hundred acres or less wheresoever situated shall be sold for cash and without condition of settlement.

All applications to purchase land, under any preference right, which were filed in the Land Office prior to the taking effect of this act shall be accepted.

No corporation shall purchase any land under the provisions of this act.

Minerals, Gayule and Lechuguilla Reserved

Sec. 6f. The land which is now or may hereafter be classed as mineral, may be sold for agricultural or grazing purposes, but all sales of such land shall be upon the express condition that the minerals, shall be and are reserved to the fund to which the land belongs and such reservation shall be stated in

all applications to purchase; provided, should any person who has no authority or right to do so cut or remove any mineral, gayule or lechugilla from the land belonging to the public free school fund, he shall be deemed guilty of a misdemeanor and upon conviction shall be fined in a sum not less than ten dollars nor more than one thousand dollars and in addition thereto judgment shall be rendered against the defendant in behalf of the State in a sum of money equal to the value of the substance so cut or removed, which shall be collected as under execution, and when collected the money shall be remitted to the State Treasurer and by him credited to the fund to which the land belongs. The Commissioner shall adopt all the necessary rules and regulations for the execution of the several provisions of this act.

CERTIFICATES OF OCCUPANCY

Sec. 6g. If a proof of occupancy has heretofore been or should hereafter be filed in the General Land Office, in accordance with the statute under which the purchase was made or may be made, and it should be approved by the Commissioner by the issuance of the certificate of its sufficiency, the said certificate may be recorded in the office of the clerk of the county or counties in which the land is situated and shall thereafter be a muniment of title of the home tract and additional land purchased to such home tract.

Sec. 3. All laws and parts of laws in conflict with the provisions of this act are hereby repealed.

Sec. 4. The fact that the law providing for the sale of land out of leases to assignees is an unjust discrimination against the public and the fact that the substances mentioned in this act as being upon the public school land and reserved to the school fund should have some protection at the earliest practicable date creates an imperative public necessity and an emergency exists that the constitutional rule requiring bills to be read on three several days be suspended and this bill be placed upon its third reading and final passage and take effect from and after its passage, and it is so enacted.

Senate Bill 295, Acts of the 54th Legislature, Chapter 278 1955

Section 1. The Commissioner of the General Land Office is hereby authorized to sell to the City of El Paso, El Paso County, Texas, for a total consideration based on the aggregate fair and reasonable market value of said land, but no less that $6.50 per acre, as determined by two appraisers appointed by the Commissioner of the General Land Office of Texas, the following described Public School Lands situated in El Paso County, and described as follows, to-wit:

(AMONG OTHER LANDS)

N½ of Section 240
N. D. Mundy Survey
Containing 328.65 acres

Section 235
L. E. Mundy Survey
Containing 292 acres

and aggregate 14,000.15 acres. Said lands shall be sold upon the filing in the General Land Office of an application to purchase by the proper authority of the City of El Paso accompanied by payment of the full consideration herein provided. Such sale shall be subject to any right-of-way easements, surface leases, or any oil, gas mineral leases or permits heretofore given by the State on said lands. All mines and minerals and mineral rights, including oil and gas in and under said lands, together with the right to enter thereon for the purpose of exploration and development, are hereby reserved to the State of Texas, and said lands shall be subject to lease by the State for mineral exploration and development in the same manner as is now, or may hereafter be provided for the leasing of unsold Public Free School Lands; provided, however, that the School Land Board or other legally constituted authority offering said lands for lease shall place in said leases such rules and regulations as may be deemed proper by said board or agency for the prevention of pollution and contamination of the fresh waters in, on and under said lands.

Section 2. Upon payment of the purchase money provided herein, payments of fees required by law, and the filing in the General Land Office of any field notes or corrected field notes required by the Commissioner of the General Land Office, patents shall be issued to the City of El Paso containing the reservations provided for in Section 1 of this Act.

Section 3. The fact that the City of El Paso is in urgent need of expanding its sources of water and of protecting water wells previously drilled creates an emergency and an imperative public necessity that the Constitutional Rule that each bill be read on three separate days in each House be suspended, and such Rule is hereby suspended, and this Act shall take effect from and after its passage, and it is so enacted.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 38

CITY OF EL PASO, - - - - - - Appellant,

versus

GREENBERRY SIMMONS, - - - - Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

BRIEF FOR APPELLEE.

HAROLD S. LONG,
El Paso National Bank Bldg.,
El Paso 1, Texas,
GREENBERRY SIMMONS,
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September 18, 1964

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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Argument:

I. The statute in force at the time the contract was made, as expressed and stipulated in the terms of the "OBLIGATION" itself, created an obligation of the State, to reinstate the contract if payment was made before the intervention of the rights of others and could not be impaired by subsequent legislation without being repugnant to Art. 1, Sec. 10 of The Constitution . . . 7–12

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IN THE

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October Term, 1964

No. 38

CITY OF EL PASO, - - - - - - *Appellant,*

v.

GREENBERRY SIMMONS, - - - - - *Appellee.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR APPELLEE.

OPINION BELOW.

The Opinion of the Court of Appeals is reported in 320 F. 2d 541 (R. 153-158).

JURISDICTION.

Jurisdiction is based upon the diversity of citizenship and is set forth in the Complaint. This Court has noted probable jurisdiction.

QUESTION PRESENTED.

After the State had specifically expressed and stipulated in the terms of the "OBLIGATION" itself, to reinstate the land at any time before the land had been resold to a third party, and after the Settlers-Vendees built their homes and lived on the lands for three years and paid interest for over thirty years, totaling more than the purchase price, does it impair the Obligation of this Contract for the State to subsequently change these expressed stipulated terms to reinstate, to five years from the date of forfeiture, after the contract had been substantially complied with by the Settlers-Vendees.

THE CONSTITUTION AND STATUTES.

The pertinent provision involved of the Constitution of the United States is the impairment of the obligation of contract. *Art. 1, Sec. 10*, which provides:

> "* * * No state shall * * * pass any * * * law impairing the obligation of contracts * * *."

The Texas statutes expressly stipulated in the terms of the "OBLIGATION" include *Art. 4218f. Texas, Arts, May 19, 1897, ch. 129*, pp. 184-185, S. S. B. No. 63, 25th Leg. (Later part of Art. 5423 and 5326. By the time both of these Article numbers were later being used, forfeiture and reinstatement were put together in one Article.) (See page 8 of this Brief, for whole Art.

4218f, see Appendix D for Appellee Simmons, pp. 55-56.)

Acts 1941, ch. 194, p. 351, Sec. 3, 47th Leg., cited as Vol. 15A, Vernon's Civil Statutes Annotated, and same article for the *Acts 1951*, ch. 59, p. 92, Vol. 15A, Vernon's Civil Statutes of the State of Texas Annotated (Art. 5326).

Acts of 1955, Senate Bill No. 295, ch. 278, 54th Leg., filed in the Secretary of State's Office May 23, 1955. Not in any Vernon's Civil Statutes of the State of Texas, as it was reputed to be a local act. (All above Acts may be found in Appendix D for Appellee Simmons, pp. 55-64, under separate cover.)

STATEMENT.

The "OBLIGATION" of the Contract (Pl. Ex. 16; R. 67) between the Settler-Vendees' predecessors in title and the State was made pursuant to the statute, and the provisions of the statute became the terms of the contract. (Appendix D For Appellee Simmons, pp. 55-56, under separate cover).

In the "OBLIGATION" of the Contract (Pl. Ex. 16; R. 67-68), the State expressly stipulated an obligation of its own, to the Settler-Vendees to reinstate his already forfeited lands, the same as it stipulated to give him a patent, provided he had built his home and lived there for three years and paid all interest before it was resold to a third party. If he did this, it would be the same as if no forfeiture had ever occurred.

The Settlers-Vendees had recorded their "Certificate of Three Years Residence" (Pl. Ex. 2a, 2; R. 48, 46-47) in the Clerk's Office and was then unable to pay his interest and his land was forfeited. This forfeiture gave the State the right to resell the forfeited land at any time before all back interest was tendered. However, this forfeiture did not in any way release the State from its expressly stipulated obligation to reinstate the Settler-Vendee's land. Here, he had tendered all back interest before the State resold the land to a third party, and having done so, it was the same as if no forfeiture had ever occurred (Pl. Ex. 32b, 32c, 32d, 32e; R. 120, 121).

After thirty years of substantial compliance of this obligation by Settlers-Vendees and also after they had paid more interest than the purchase price of the land, the legislature passed the Acts of 1941 and 1951 (Appendix D, pp. 57-60), without changing the original expressed provisions and terms as to reinstatement. It further provided that reinstatement must be made within five years from the date of forfeiture.

On July 21, 1947, the land was forfeited for nonpayment of interest. Any time after forfeiture and before reinstatement, the State could have and generally did resell this land, but here it did not do so.

On July 14, 1952, Settler-Vendee Simmons recorded his deeds in the County Clerk's Office (Pl. Ex. 28, 30; R. 104, 110).

Three and one-half years before the State attempted to resell this land, on July 23, 1952, the Land Com-

missioner for the State received sworn application, dated July 17, 1952, stating that Simmons was the owner and that he reinstated the land and tendered checks for all back interest (Pl. Ex. 32b, 32c, 32g, 32; R. 120, 121).

On July 24, 1952, the Land Commissioner sent a letter stating that they were not filed within the five year period. He did not complain about the forfeiture, but about the reinstatement. This five year limitation had been subsequently added in 1941 and 1951 Acts (Pl. Ex. 32; R. 116).

The Settler-Vendee had substantially complied with the terms of the statutory requirements for reinstatement of his land, under the expressed stipulation of his Obligation of Contract (Appendix D, pp. 16e-16f). His deeds had been recorded in the County Clerk's Office, there was nothing else required of him (Pl. Ex. 28, 30; R. 106-107, 112).

On January 26, 1956, three and one-half years later, the State issued patents to the City, pursuant to the Act of 1955 of the Legislature, which act provided for sale to the City of 14,000 acres of land, including and attempting the reselling of Simmons' reinstated lands to the City (Appendix D, pp. 61-64). The City was a subsequent purchaser with constructive notice (Appendix D, p. 54; R. Index pp. I-VII, Pl. Ex. I-33A, 82 pages of recorded instruments for over 45 year period).

When the Settler-Vendee found that his land had been later resold, he immediately brought this suit,

called in Texas, trespass to try title, against the City of El Paso on August 31, 1961, to determine whether the City's three and one-half year subsequent claim should prevail over this Settler-Vendee's prior reinstatement and prior recorded deeds (R. 4).

Both parties made Motion for Summary Judgment and the District Court held that the Plaintiff Simmons take nothing and that the City prevail. Simmons, appealed this to the Court of Appeals, which reversed the District Court and ruled that Simmons had reinstated his lands and was the prior recorded owner. That the Legislative Acts of 1941 and 1951, adding a five-year limitation from the date of forfeiture, impaired the expressed terms of the obligation of the contract, which had already specified a limitation of its own pertaining to reinstatement of forfeited lands. The City appealed this to this Court, which noted probable jurisdiction.

Appellee Simmons, in support of his Motion to Affirm, filed under separate cover, his already printed brief for both Courts below, marked Appendix D For Appellee Simmons. To prevent repetition and if further information is desired, we refer to (a) on the Statement of the Case (Appendix D, pp. 6-15), (b) Brief or Summary of the Argument (Appendix D, pp. 16b-16i) and (c) Argument on Impairment of the Obligation of Contract, Point IV (Appendix D, pp. 43-52). This appendix is likewise made an Appendix D For Appellee Simmons on this Brief on the Merits.

ARGUMENT.

I. The Statute in Force at the Time the Contract Was Made, as Expressed and Stipulated in the Terms of the "Obligation" Itself, Created an Obligation of the State, to Reinstate the Contract if Payment Was Made Before the Intervention of the Rights of Others and Could Not Be Impaired by Subsequent Legislation, Without Being Repugnant to Art. 1 Sec. 10 of The Constitution.

Settlers Glenn and Kilpatrick, the predecessors in title of Vendee Greenberry Simmons, in 1910 made the following applications to purchase the land herein involved.

The application says:

> "I hereby apply to purchase under the provision of * * * ch. 129, Act of May 19, 1897 * * *."

The "OBLIGATION" itself of the Contract says:

> "* * * purchased by me this date of the State of Texas, in accordance with the provisions of * * * ch. 129, Act of May 19, 1897 * * *."

Signed by both Settlers Glenn and Kilpatrick. On the back of this contract it says:

> "Awarded Apr. 30, 1910," signed "J. H. Robinson," "Commissioner General Land Office." (Pl. Ex. 16; R. 67-68, 138-141).

When the Land Commissioner awarded this land to these settlers in 1910, he obligated the State of Texas under the specified part of the Contract called "OBLI-

GATION", in accordance with the provisions of chapter 129 of the Act of May 19, 1897, Art. 4218f. This Article 4218f specifically expressed and stipulated, a limitation of its own in the statute, for a method of reinstating lands which had already been forfeited, provided it had not been resold to a third party, meaning that no rights of third parties had intervened, which is as follows:

> "In any cases where lands have been forfeited to the State for the non-payment of interest, the purchasers or their vendees may have their claims reinstated on their written request, by paying into the treasury the full amount of interest due on such claim up to the date of reinstatement; provided, that no rights of third persons may have intervened. In all such cases the original obligations and penalties shall thereby become as binding as if no forfeiture had ever occurred."

The Statute (Art. 4218f) at the time the contract was made in 1910, further provided that:

> "* * * such lands shall be subject to sale, but to actual settlers only * * *. And if he or his vendor has already resided upon his home section for three years, * * *, the additional lands purchased may be patented at any time." (Appendix D For Appellee Simmons, pp. 55-56, all of Art. 4218f, ch. 129, Act of May 19, 1897).

Settlers Glenn and Kilpatrick immediately moved upon these lands and built their homes upon them and spent $2,850.00 for improvements, lived on these lands

for three years following, and in 1913 obtained their "Certificate of Three Years Residence" from the General Land Commissioner and recorded them in the Deed Book of the County's Clerk's Office (Pl. Ex. 2, 2a, 17; R. 46, 48, 69).

Soon after, the legislature amended Art. 4218f. ch. 129, so that land could be sold to others not settlers.

Between the years 1910 and 1941, the settlers and their vendees paid interest on these contracts for over thirty years, which amounted to more than the purchase price of the land.

The State had wanted the settlers so badly that they have extended from time to time the payment of principal, which they have never called to become due. (Various statutes from time to time.)

After the Settlers-Vendees had substantially complied with the obligations of their contract for over thirty years, the State Legislature passed an act, limiting the right to reinstate to a term of five years from the date of forfeiture, which was repugnant to the expressly stipulated terms of reinstating this land, which had obligated the State in 1910; namely, to reinstate the land which had already been forfeited, provided the State had not resold this land to a third party.

The State could not do this under the pretense of a remedy or under any other pretense, because it had in the "OBLIGATION" itself of the Contract, stated, an expressed stipulation of its own, in the terms of reinstating land which was already forfeited, and when the legislature attempted subsequently to change this,

it impaired the obligation itself of its own contract, which it had agreed and expressed to do, back in 1910 (Appendix D, p. 16i).

The Courts of Texas have held that this right to reinstate forfeited lands, provided the State has not resold this land to a third party, has been held to be a right which cannot be changed by legislation without the consent of both parties. *Gulf Production Co. v. State*, 98 Tex. 237, 231 S. W. 124, 131 (Appendix D For Appellee Simmons, p. 27, History p. 26, 16f).

There was and is a great difference, both in the Texas statutes and in the well settled cases in Texas, between forfeiture and reinstatement. A mere forfeiture in this case is admitted, and is not a vested right, whereas the reinstatement of land which is already forfeited is the issue here and is a vested right. It provides for more obligations on the part of the State than the ordinary redemption statutes.

The forfeiture only, was then covered by ch. 37, Acts of March 25, 1897, p. 39, which was passed in the same year 1897; however, it is a different chapter from the reinstatement of land already forfeited, covered by ch. 129, Act of May 19, 1897, p. 185, in Art. 4218f. The latter was a part of the "OBLIGATION" itself of this Contract, at the time it was made in 1910.

Later, when these two statutes were put together under one Art. 5423, which later became Art. 5326, a Texas Court in 1921 set out the difference between the statute covering forfeiture and the statute covering reinstatement (Appendix D, p. 29).

Waggoner v. *Flack*, 188 U. S. 595 and *Wilson* v. *Standifer*, 184 U. S. 399, are inapplicable here. They construe the forfeiture only statute, whereas the issue here is the construction of the reinstatement statute and as it was in 1910, at the date of this Contract, Art. 4218f.

Furthermore, in the immediately named cases and also in the *Faulkner* v. *Lear*, 258 S. W. 2d 147, the Settlers-Vendees there failed to pay all back interest before the State resold the land to third parties. In the case at bar the Settlers-Vendees tendered all back interest three and one-half years before the state sold to the City and fully complied with their reinstatement statute, which also expressly stipulated in the terms of the "OBLIGATION" itself, all such cases "shall thereby become as binding as if no forfeiture had ever occurred."

The State could not complain that the Settlers-Vendees' lands were forfeited, because it had expressly stipulated in the terms of the obligation of this contract, if all back interest was paid before the intervening rights of third parties, the "original obligations" of both parties would become "as binding as if no forfeiture had ever occurred."

What were the expressed stipulated terms in the "OBLIGATION" itself, of the State, under Art. 4218f? It was not that the land be not forfeited. It was that upon payment of all back interest before resale, that these expressed and stipulated terms of the "Original Obligations" of the State "become as binding as if no forfeiture had ever occurred."

Then subsequently this expressed and stipulated original obligation was impaired by the 1941 and 1951 Acts, attempting to change to five years from forfeiture, when under its "Original Obligation," it could not make any change, after thirty years of substantial compliance, without violating the rights given Settlers-Vendees under Art. 1, Sec. 10 of the Constitution of the United States.

In the case cited by the Court of Appeals of *Home Insurance Co.* v. *Dick,* 281 U. S. 397, Mr. Justice Brandeis said, at page 411:

> "But in Texas, as elsewhere, this contract was subject to its own limitations."

Again, at page 406:

> "Nor are we concerned with the question whether the provision is properly described as relating to remedy or to substance. However characterized, it is in expressed terms in the contract of the parties by which the right of the insured and the correlative obligation of the insurer are defined."

II. The Decision Below Should Be Affirmed.

Judge Jones for a unanimous Court of Appeals, said:

> "The Obligations, accepted by the Texas Land Commissioner, recited the purchase of the described land in accordance with the provisions of the foregoing Statutes of Texas."

He went on to set out the reinstatement portion of the Statute, which had hereto been quoted. Then he quoted the Statute which was passed in 1941 and 1951, putting in the five year limitation from the date of forfeiture. He then set out the substantial compliance by the Settler-Vendees and the letter from the Land Commissioner acknowledging the receipt of the applications to reinstate and the checks for the payment of all back interest. Then he said at page R. 156:

> "The contract between the Appellant's Predecessor in Title and the State was made pursuant to the Statute, and the provisions of the Statute became the terms of the contract."

On R. page 157 of his Opinion, he went on to state what the Texas Court had done with reference to the reinstatement of land already forfeited, provided no rights of third parties had intervened, and cited what the *Gulf Production Co.* v. *State*, Tex. Civ. App. 231 S. W. 124, 131, had said that neither the State nor the purchaser could arbitrarily and without the consent of the other, write into the contract any provision restricting the terms of the contract. Also at p. 134 of the last cited case, it states that it is a vested right.

Since 1900, in *Anderson* v. *Neighbors*, 94 Tex. 336, 56 S. W. 543, 544, this statute has been held to give the Settlers-Vendees, after they have spent three years upon their lands, a vested right, to reinstate their forfeited lands,[1] entitling them to the protection of Constitutional guarantees. Then Judge Jones goes on to

[1]For a list of further Texas cases on reinstatement being vested rights, see Appendix D, pp. 16h, 16f, 28, 36.

say that the statute in force when the purchase was made gave the purchaser a right to redeem from forfeiture, and it was not one dealing with a remedy, but on the contrary, creating an obligation of the State to reinstate the contract if payment was made before the intervention of the rights of others, which was done in this case.

Although the Court of Appeals adjudged that Simmons was the prior recorded owner of these lands, it remanded the case to the District Court, because it stated that the District Court did not consider the Defendant's defenses of adverse possession and laches. There have been some steps taken in the Courts below since it was returned to that District Court, and this Honorable Court may desire to be informed as to these steps taken, since the decision of the Court of Appeals, or the Court may desire to take judicial notice of these steps. *Dakota County* v. *Glidden*, 113 U. S. 222, 226.

The City has not made an application or motion for a stay of the proceedings in the lower courts under this Court's Rule 18 (1) or any other rule. On September 26, 1963, the mandate of the Court of Appeals went to the District Court with instructions as aforesaid. The District Judge on February 7, 1964, set this case for a pre-trial hearing for April 20, 1964 at 2:00 p. m. He also put it upon his docket for the 13th of April, stating that:

> "Copies of all papers * * * must be furnished to the Court not later than ten (10) days before April 13, 1964." (Appendix K For Appellee Simmons, p. 48, under separate cover).

Appellee Simmons here, Plaintiff Simmons below, on April 1, 1964, abiding by the discretion exercised by the new District Judge, and ten days before the docket was called, filed printed "Plaintiff's Request for Admissions Under Rule 36," pertaining to the City's defense of adverse possession and laches.

These admissions requested the admission of genuineness of certain documents and the admissions that certain statements were true. The City filed an answer, but the City did not reply under oath and did not specifically reply to the first 15 statements on pp. 41 and 42, as required by Rule 36 F.R. Civ. P. If these 15 statements are deemed to be answered in the affirmative and including the answer to No. 3, the City made no visible improvements of any kind on these lands remaining on them for the required five years continuous period.

The requirements of the Court of Appeals for remanding the suit to the District Court, for all practical purposes have been carried out and may have thereby become moot.

The City's answer is printed at the end of these questions and also the District Judge's notice of placing the case upon the pre-trial docket, together with the instructions that all papers must be filed within ten days before April 13, 1964. (Filed under separate cover as Appendix K For Appellee Simmons, pp. 48-51.)

We submit to this Honorable Court, that this transcript of Record as shown in the Index pp. I-VII, all

admitted as genuine, the certified copies of the official records and documents, covering a period of over one-half century, is more than what some outstanding historian said about it, and is the most accurate history of what really happened to the settlers, who settled up these dry and semi-arid lands of the Southwest.

A typical historical summary of their hardships may be found in five pages, R. 133-138.

Certainly, to say the least, Texas would not be a state of this Union, had it not been for these men and women who endured these hardships.

In Law, in fact and in equity, on this now cold record, which long ago was very hot, these Settlers-Vendees who got there first, are entitled to these lands rather than those who came subsequently with constructive notice.

Very seldom do the titles of the settlers' homesites get into Federal Courts.

This could be one of the outstanding opportunities ever to come before this Court, in all its history, and may be one of the last, for it to say what it thinks about these deserving settlers and to affirm what the Texas Courts and the Court of Appeals here below, have been saying about them and their vested rights for over one-half a century.

CONCLUSION.

For these reasons stated, it is respectfully submitted that the Judgment of the Court of Appeals below should be affirmed and modified, giving judgment to Simmons rather than remanding the case to the District Court.

Respectfully submitted,

HAROLD S. LONG,
El Paso National Bank Building,
El Paso 1, Texas,

GREENBERRY SIMMONS,
Kentucky Home Life Building,
Louisville, Kentucky, 40202,

Counsel for Appellee.

September 18, 1964.

PROOF OF SERVICE.

I, Greenberry Simmons, one of the Attorneys for Greenberry Simmons, Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby Certify that on the 18th day of September, 1964, I served copies of the foregoing Brief for Appellee and Appendix K for Appellee Simmons, which is under separate cover, on the Appellant, City of El Paso, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to the respective Attorneys of record as follows:

To Thorton Hardie, Esq.

To William J. Mounce, Esq.

Attorneys for Appellant,
City of El Paso,
El Paso Natural Gas Company Bldg.,
El Paso, Texas.

Greenberry Simmons,

Attorney for Greenberry Simmons,
Kentucky Home Life Building,
Louisville, Kentucky, 40202.

Office-Supreme Court, U.S.
FILED
SEP 21 1964
JOHN F. DAVIS, CLERK

No. 38

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1964

CITY OF EL PASO, - - - - - - Appellant,

versus

GREENBERRY SIMMONS, - - - - Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

APPENDIX K FOR APPELLEE SIMMONS.

HAROLD S. LONG,
El Paso National Bank Building,
El Paso 1, Texas,

GREENBERRY SIMMONS,
Kentucky Home Life Building,
Louisville, Kentucky 40202,
Counsel for Appellee.

September 18, 1964.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS
EL PASO, DIVISION

Civil No. 2334

GREENBERRY SIMMONS, - - - - - Plaintiff,

versus

CITY OF EL PASO, - - - - - - Defendant.

PLAINTIFF'S REQUEST FOR ADMISSION UNDER RULE 36.

HAROLD S. LONG,
El Paso National Bank Bldg.,
El Paso 1, Texas,

GREENBERRY SIMMONS,
Kentucky Home Life Bldg.,
Louisville Kentucky, 40202

Attorneys for Plaintiff.

March 31, 1964.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS
EL PASO, DIVISION

Civil No. 2334

GREENBERRY SIMMONS, - - - - - *Plaintiff*,

v.

CITY OF EL PASO, - - - - - - *Defendant*.

PLAINTIFF'S REQUEST FOR ADMISSION UNDER RULE 36, F. R. Civ. P.

Plaintiff, Greenberry Simmons, requests Defendant, City of El Paso, within ten days after service of this Request, to make the following admission for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

I. THAT EACH OF THE FOLLOWING DOCUMENTS, EXHIBITED WITH THIS REQUEST, IS GENUINE:

(A) Certified Copy of the Records of the Texas General Land Office, Made by the General Land Commissioner, of a Letter Dated October 26, 1963, From Greenberry Simmons, Plaintiff, Tendering Again All Interest and All Principal Due on These Contracts. It Is Stamped "Received October 30, 1963, General Land Office."

Simmons' Compliance with the Court of Appeals Opinion at p. 545.

"The tender made by the Appellant, assuming it has been or will be kept good, reinstated the contract." *Simmons* v. *City of El Paso*, 320 F. 2d 541, 545.

PLAINTIFF'S EXHIBIT No. 34

GREENBERRY SIMMONS
Attorney at Law
Kentucky Home Life Building
Louisville 2, Kentucky

October 26, 1963

Mr. Jerry Sadler, Commissioner.
General Land Office for the State of Texas
Austin 14, Texas

Dear Mr. Sadler:

Re: N 2 Survey 240, N. D. Mundy, El Paso County,
File No. 147016 and other file numbers.
Survey 235, Laura E. Mundy, El Paso County,
File No. 112121 and other file numbers.

In order to comply with the Court's opinion and the Land Purchase Contracts of 1910 involved and the latter is already filed in the Land Office, enclosed are the following pertaining to the above specified parcels of land:

1. Certified Copy of the Judgment in Greenberry Simmons v. City of El Paso entered September 28, 1963 by the U. S. Court of Appeals for the Fifth Circuit.

2. Letter dated Sept. 28, 1963 from the Clerk of that court pertaining to this Certified Judgment.

3. Copy of the opinion of the Court is reported in 320 F. 2d 541.

4. Certified Copies of Deeds recorded in the County Clerk's office of El Paso County, Texas:

A. D. H. Heineman, heir of D. G. Heineman, grantor to Greenberry Simmons, grantee. Recorded 7 14 52.

B. Affidavit of Heirship of D. H. Heineman, Recorded 7/14 52.

C. Tella H. Heineman, grantor to Greenberry Simmons grantee, Recorded 7 14 52.

D. Affidavit of Heirship of Tella H. Heineman, Recorded 7/14/52.

5. Two applications of Greenberry Simmons to reinstate the forfeited lands and two duplicated checks (not to be cashed) for all back interest, as was tendered in 1952.

Please file all the above instruments and charge the filing fees to my Account No. 742.

6. Current checks for all principal and all interest due on N/2 Survey 240 N. D. Mundy, El Paso County as follows:

A.	All Principal	$492.98
B.	All back interest to July 23, 1952. .	430.11
C.	All back interest from July 23, 1952 to date	171.62

7. Current Checks for all principal and all interest due on Survey 235 Laura E. Mundy as follows:

A.	All Principal	$438.00
B.	All Interest to July 23, 1952.	251.02
C.	All Interest from July 23, 1952 to date	148.92

We believe that the above checks pay all amounts due in full under the Land Purchasing Contracts of 1910 and the court's opinion. However we are tendering a further check to pay any other sums which you believe are due under the contracts and court's opinion and the balance left over to be added to my charge account #742, in the Land Office. This tendered check is for one thousand dollars.

The total of all seven checks tendered is twenty nine hundred thirty two dollars and sixty five cents. This should be much more than the total amount due.

It may be surprising to realize, the fact that my predecessors in title and I have paid the State, over three times the $1.50 contracted purchase price for these lands. In

addition Settlers Glenn and Kilpatrick lived 3 years on these homesite lands to acquire the vested rights in these 3 year Residential Occupational Certificates. These were recorded in 1913 in the Land Office and the County Clerk's Office, as our Muniments of Title. Acts May 16, 1907 pp. 495-496.

I received a letter from the Acting Commissioner of the Land Office on September 6, 1952 with reference to the D. G. Heineman properties, saying "after patent is issued, all title inures to the benefit of the legal owners • • • ". Is this position still maintained by the Land Office?

If you have other suggestions I will be glad to hear from you or if you think best call me collect, Louisville, Ky., Area Code No. 502, Tel. 451-4314 or 583-8905.

Sincerely yours,

Reply to this address:

(s) Greenberry Simmons,
1484 Cherokee Road,
Louisville, Kentucky.

Encs. 17

Page one has the following notations:

CK 438.00 16103
CK 430.11 16104
CK 171.62 16105
CK 492.98 16106
CK 251.02 16107
CK 148.92 16108
CK 1,000.00 16109

RECEIVED
OCT 30 1963
GENERAL LAND OFFICE

Page two has the following notations:
Nos. 16103, 16104, 16105, 16106, 16107, 16108, 16109.

GENERAL LAND OFFICE, AUSTIN, TEXAS.
November 21, 1963

I, JERRY SADLER, Commissioner of the General Land Office of the State of Texas, do hereby certify that on the reverse hereof is a true and correct copy of the original of this instrument now on file in this office together with all endorsements thereon.

IN TESTIMONY WHEREOF, I, hereunto set my hand and affix the seal of said office the day and date first above written.

Commissioner of the
General Land Office

Jerry Sadler.

(Seal)

(B) Seven Checks Payable to the General Land Office, Dated October 28, 1963, Signed by Greenberry Simmons, Received Oct. 30, 1963 and Stamped With the General Land Office Register Nos. 16103-16109, Totaling $2,932.65 for All Interest and All Principal Due to Obtain Legal Title to go With the Already Obtained Equitable Title, so as to Have Full Title to the Two Involved Parcels of Lands, to Comply With the Opinion of the Court. The Seven Checks Are Marked as Plaintiff's Exhibits 34A-34G.

PLAINTIFF'S EXHIBIT No. 34A.

21-10
830

16104
No.
10-28 1963

Pay to the order of General Land Office $430.11

Four hundred thirty and 11 100 ——— Dollars

For All back interest to July 23, 1952
N 2 Survey 240 N. D. Mundy, El Paso
County Texas

To Comply with Court opinion to
reinstate Land purchase
Contract 1910.

(s) Greenberry Simmons
Special Account

CITIZENS FIDELITY
BANK & TRUST CO.
LOUISVILLE, KENTUCKY

:0830 - - 001 0:

PLAINTIFF'S EXHIBIT No. 34B.

21-10
830

16105
No.
10-28 1963

Pay to the order of General Land Office $171.62
One hundred seventy one and 62 100 Dollars
For All back interest from July 23, 1952
to date Nov. 1, 1963 N 2 Survey 240
N. D. Mundy, El Paso Texas
To Comply with Court's opinion
Contract 1910

(s) Greenberry Simmons
Special Account

CITIZENS FIDELITY
BANK & TRUST CO.
LOUISVILLE, KENTUCKY
:0830 - - - 001 :0:

PLAINTIFF'S EXHIBIT No. 34C.

21-10
830

16103
No.
10-28 1963

Pay to the order of General Land Office $438.00 100
Four hundred thirty eight and 00 100 Dollars
For All principal due on Land
Purchasing Contract 1910
Survey 235, Laura E. Mundy
El Paso, County, Texas

(s) Greenberry Simmons
Special Account

CITIZENS FIDELITY
BANK & TRUST CO.
LOUISVILLE, KENTUCKY
:0830 - - - 001 :0:

PLAINTIFF'S EXHIBIT No. 34D.

21-10
830

16109

No.

10-28 1963

Pay to the order of General Land Office $1000.00 100

One thousand 00/100 ——————————Dollars

For Any balance if any due in principal, interest or any other costs, on Contracts of 1910 N 2 Survey 240 N. D. Mundy Survey 235 Laura E. Mundy both El Paso County Texas

(s) Greenberry Simmons
Special Account

CITIZENS FIDELITY
BANK & TRUST CO.
LOUISVILLE, KENTUCKY

:0830 - - - 00[illegible]0:

PLAINTIFF'S EXHIBIT No. 34E.

21-10
830

16107

No.

10-28 1963

Pay to the order of General Land Office $251.02 100

Two hundred fifty one and 02 100 ——————————Dollars

For All interest to July 23, 1952 Survey 235 Laura E. Mundy El Paso Co., Texas. To Comply with Court opinion to reinstate Land Purchasing Contract 1910

(s) Greenberry Simmons
Special Account

CITIZENS FIDELITY
BANK & TRUST CO.
LOUISVILLE, KENTUCKY

:0830 - - - 00[illegible]0:

PLAINTIFF'S EXHIBIT No. 34F.

21-10
830

16108
No.

10-28 1963

Pay to the order of General Land Office $148.92/100
One hundred forty eight and 92 100 Dollars
For All back interest from July 23, 1952
to date, Nov. 1, 1963 Survey 235 Laura E. Mundy,
El Paso County, Texas. To Comply with
Court's opinion, Contract
1910.

(s) Greenberry Simmons
Special Account

CITIZENS FIDELITY
BANK & TRUST CO.
LOUISVILLE, KENTUCKY

:0830 - - - 001 20:

PLAINTIFF'S EXHIBIT No. 34G.

21-10
830

16106
No.

10-28 1963

Pay to the order of General Land Office $492.98
Four hundred ninety two and 98 100 Dollars
For All principal due on Land Purchasing
Contract 1910 for N 2 Surey 240
N. D. Mundy, El Paso County Texas

(s) Greenberry Simmons
Special Account

CITIZENS FIDELITY
BANK & TRUST CO.
LOUISVILLE, KENTUCKY

:0830 - - - 001 20:

(C) Certified Copy of Letter, Dated November 13, 1963 From Jerry Sadler, Commissioner of the General Land Office, to Greenberry Simmons, in Reply to the Above Letter Sent Him, Dated October 26, 1963, in Which He Returned All 17 Enclosures, Including the Seven Checks Which Had Been Tendered to Comply With the Opinion of the Court. Plaintiff's Exhibit No. 35.

PLAINTIFF'S EXHIBIT No. 35.

November 13, 1963

Mr. Greenberry Simmons
Attorney at Law
1484 Cherokee Road
Louisville, Kentucky,

Re: Files 147016 & 142121
El Paso County, Texas

Dear Mr. Simmons:

This will acknowledge receipt of your letter dated October 26, 1963, with enclosures pertaining to the above referenced matter.

We have examined your request as contained in your correspondence and find that such requested action is not appropriate at this time. We are therefore returning to you the following:

1. Certified Copy of the Judgment in Greenberry Simmons v. City of El Paso entered September 28, 1963 by the U. S. Court of Appeals for the Fifth Circuit.

2. Letter dated September 28, 1963 from the Clerk of that court pertaining to this Certified Judgment.

3. Copy of the opinion of the Court is reported in 320 F. 2d 541.

4. Certified Copies of Deeds recorded in the County Clerk's office of El Paso County, Texas.

A. D. H. Heineman, heir of D. G. Heineman, grantor, to Greenberry Simmons, grantee. Recorded 7/14/52.

B. Affidavit of Heirship of D. H. Heineman. Recorded 7/14/52.

C. Tella H. Heineman grantor to Greenberry Simmons grantee. Recorded 7/14/52.

D. Affidavit of Heirship of Tella H. Heineman. Recorded 7/14/52.

5. Two applications of Greenberry Simmons to reinstate forfeited lands and two duplicated checks (marked not to be cashed).

6. Seven (7) original checks returned direct herewith as follows:

General Land Office Register No. 16103	$ 438.00
General Land Office Register No. 16104	430.11
General Land Office Register No. 16105	171.62
General Laind Office Register No. 16106	492.98
General Land Office Register No. 16107	251.02
General Land Office Register No. 16108	148.92
General Land Office Register No. 16109	1,000.00

Yours very truly,

Jerry Sadler, Commissioner.

JS:ths
Enclosures

Register Nos. 16103, 16104, 16105, 16106, 16107, 16108, 16109

REGISTERED MAIL
RETURN RECEIPT
REQUESTED

GENERAL LAND OFFICE, AUSTIN, TEXAS,
November 21, 1963.

I, JERRY SADLER, Commissioner of the General Land Office of the State of Texas, do hereby certify that on the reverse hereof is a true and correct copy of the original of this instrument now on file in this office together with all endorsements thereon.

IN TESTIMONY WHEREOF, I, hereunto set my hand and affix the seal of said office the day and date first above written.

Commissioner of the
General Land Office

Jerry Sadler
(Seal)

(D) Signed Identical Copy of the Above Certified Copy of the Letter From Jerry Sadler, General Land Commissioner, Acknowledging the Receipt of Seven Checks for All Interest and All Principal, as Well as the Rest of the 17 Enclosures and Returning Them. Plaintiff's Exhibit No. 35A.

PLAINTIFF'S EXHIBIT No. 35A.

November 13, 1963

Mr. Greenberry Simmons
Attorney at Law
1484 Cherokee Road
Louisville, Kentucky, 40204

Re; Files 147016 & 112121
El Paso County, Texas

Dear Mr. Simmons:

This will acknowledge receipt of your letter dated October 26, 1963, with enclosures pertaining to the above referenced matter.

We have examined your request as contained in your correspondence and find that such requested action is not

appropriate at this time. We are therefore returning to you the following:

1. Certified Copy of the Judgment in Greenberry Simmons v. City of El Paso entered September 28, 1963 by the U. S. Court of Appeals for the Fifth Circuit.

2. Letter dated September 28, 1963 from the Clerk of that court pertaining to this Certified Judgment.

3. Copy of the opinion of the Court is reported in 320 F. 2d 541.

4. Certified Copies of Deeds recorded in the County Clerk's office of El Paso County, Texas.

A. D. H. Heineman, heir of D. G. Heineman, grantor to Greenberry Simmons, grantee. Recorded 7/14 52.

B. Affidavit of Heirship of D. H. Heineman. Recorded 7 14 52.

C. Tella H. Heineman grantor to Greenberry Simmons grantee. Recorded 7 14 52.

D. Affidavit of Heirship of Tella H. Heineman. Recorded 7 14 52.

5. Two applications of Greenberry Simmons to reinstate forfeited lands and two duplicated checks (marked not to be cashed).

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General Land Office Register No. 16104	430.11
General Land Office Register No. 16105	171.62
General Land Office Register No. 16106	492.98
General Land Office Register No. 16107	251.02
General Land Office Register No. 16108	148.92
General Land Office Register No. 16109	1,000.00

Yours very truly,

(Signed) Jerry Sadler
Jerry Sadler, Commissioner.

JS:ths
Enclosures

Register Nos. 16103, 16104, 16105, 16106, 16107, 16108, 16109

REGISTERED MAIL
RETURN RECEIPT
REQUESTED

(E) Certified Copy of the City's Purported Patent and Grant (Printed Record, p. 30) Dated January 26, 1956, Granting to the City of El Paso, Its Own Created Municipality, the N/2 Survey 240, Nellie D. Mundy, Which Was Filed in El Paso County Clerk's Office on January 30, 1956, Patent No. 75412 Stating Upon Its Face that the State Reserved the Right to Lease These Lands for Oil and Gas.

"* * * in the same manner as * * * provided for the leasing of Unsold Public Free School Lands * * *"

This was not "Unsold Public Free School Lands" but had been sold over 45 years before to settlers with contracted vested rights, and was still sold at that time, according to the Court of Appeals for the Fifth Circuit in its Opinion, in this suit.

The Patent further states that it relinquishes to the City and not to Simmons, as it had contracted to do,

"* * * all the right and title in and to said land heretofore held and possessed by said State * * *."

This sale to the City, by the Legislative Act of 1955, which is the basis of this Patent, has been declared illegal and void and in violation of the rights given to Plaintiff under the Constitution of the United States, Contract Clause and Due Process, *Simmons* v. *City of El Paso*, 320 F. 2d 541, 543, 544. Plaintiff's Exhibit No. 36.

PLAINTIFF'S EXHIBIT No. 36.

Vol. 25-B 75412 No. 492

IN THE NAME OF THE STATE OF TEXAS

To All to Whom These Presents Shall Come, Know Ye:

I, Allan Shivers, Governor of the State aforesaid, by virtue of the power vested in me by law and in accordance with the laws of said State in such case made and provided, do by these presents Grant to The City of El Paso, A Municipal Corporation, its successors and assigns forever, Three Hundred Twenty Eight & 65 100 (328.65) acres of land situated and described as follows in El Paso County, known as North ½ of Survey 240, S.F.7219, Nellie D. Mundy, about 11 miles North 30° West from El Paso, Texas. Bought and fully paid for on the application of The City of El Paso, by Tom E. Rogers, Mayor, filed in the General Land Office November 14, 1955 under the laws regulating the sale of Public Free School land, and provisions of S. B. 295, Acts 54th Legislature, 1955.

Beginning at the Southeast corner of Section 239, Nellie D. Mundy, in the West line of Section 243, Nellie D. Mundy, for the Northeast corner of this survey and Northeast corner of Section 240;

Thence South 738.2 varas with the West lines of Section 243 and Section 242, Nellie D. Mundy, to the Northeast corner of the South ½ of Section 240;

Thence West 2514 varas to the Northwest corner of the South ½ of Section 240;

Thence North 0° 07' East 738.2 varas with the West line of Section 240 to the Northwest corner of Section 240;

Thence East 2512.. varas to the place of beginning.

This grant shall be subject to any right of way easements, surface lease, or any oil, gas, mineral leases or permits heretofore given by the State on said lands. All mines and mingrals and mineral rights, including oil and gas in and under said lands, together with the right to

enter thereon for the purpose of exploration and development, are hereby reserved to the State of Texas, and said lands shall be subject to lease by the State for mineral exploration and development in the same manner as is now, or may hereafter be provided for the leasing of unsold Public Free School Lands; provided, however, that the School Land Board or other legally constituted authority offering said lands for lease shall place in said leases such rules and regulations as may be deemed proper by said Board or agency for the prevention of pollution and contamination of the fresh waters in, on, and under said lands.

Hereby relinquishing to It the said The City of El Paso and its successors or assigns forever all the right and title in and to said land heretofore held and possessed by the said State, and I do hereby issue this Letter Patent for the same.

(F-152973)

In Testimony Whereof, I have caused the Seal of the State to be affixed, as well as the Seal of the General Land Office. Done at the City of Austin on the Twenty Sixth day of January, in the year of Our Lord One Thousand Nine Hundred and Fifty Six.

(Seal)
(Signed) Allan Shivers,
Governor.

(Seal)
(Signed) J. Earl Rudder,
Commissioner of the General Land Office.

75412

FILED FOR RECORD
IN MY OFFICE
1956 Jan 30 PM 12:16
Raymond L. Telles, Jr.
County Clerk, El Paso County, Texas
(Signed) W. T. Duncan

The State of Texas }
County of El Paso }

I, J. W. Fields, County Clerk in and for El Paso County, State of Texas, do hereby certify that the foregoing is a true and correct copy of the: Patent From: State of Texas To: City of El Paso. Dated the 26th day of Jan., 1956, as the same appears of record in the Deed Records of Said County in Volume 1272 Page 554 thereof.

Given under my hand and seal of office at office in El Paso, Texas, this the 26 day of Nov. A.D., 1963.

J. W. Fields, County Clerk,
El Paso County, Texas.
By: (Signed) Antonio Chavez,
Deputy.

(Seal)

The State of Texas }
County of El Paso }

I, J. W. Fields, County Clerk of El Paso County, Texas, and Antonio Chavez, his deputy, further certify that we are the officers who have the custody of the filed original official records from which these true Certified Copies were made and also we have the legal custody of these filed original official records.

In Testimony Whereof, we have hereto set our hands and affix the seal of said office, this the 26 day of Nov. A. D. 1963.

(Signed) J. W. Fields,
J. W. Fields, County Clerk of
El Paso County, Texas.

(Signed) Antonio Chavez,
Antonio Chavez, Deputy.

(Seal)

(F) Certified Copy of the City's Purported Patent and Grant (Printed Record, p. 30) and Dated the Same as, and Having the Same Provisions as, the Patent and Grant in (E) Above, Except It Convey Survey 235 Laura E. Mundy and Has County Clerk's Patent No. 75413. Plaintiff's Exhibit No. 37.

PLAINTIFF'S EXHIBIT No. 37.

Vol. 25-B 75413 No. 491

IN THE NAME OF THE STATE OF TEXAS

To All to Whom These Presents Shall Come, Know Ye:

I, Allan Shivers, Governor of the State aforesaid, by virtue of the power vested in me by law and in accordance with the laws of said State in such case made and provided, do by these presents Grant to The City of El Paso, A Municipal Corporation, its successors and assigns forever, Two Hundred Ninety Two (292.) acres of land situated and described as follows in El Paso County, known as Survey 235, S.F. 7230, Laura E Mundy, about 13½ miles North 13°55' West from El Paso, Texas. Bought and fully paid for on the application of The City of El Paso, by Tom E. Rogers, Mayor, filed in the General Land Office, November 14, 1955 under the laws regulating the sale of Public Free School land, and provisions of S.B. 295, Acts 54th Legislature, 1955.

Beginning at stake and rock mound set on the South line of Laura E. Mundy Survey No. 232 on bench at East end of canyon from which a black gulch on West slope of Mt. Anthony bears East, for the Northwest corner of this survey, 1856 varas South and 3860 varas East by actual survey from an iron pipe and rock mound found at Northeast corner of Survey 174, which latter corner is 1717 varas East of R. R.

Thence from said beginning point, East, at 377 varas pass rock mound set for Southeast corner said Survey 232, at 820.6 varas set rock mound on South side arroyo in small canyon, at 865.7 varas to stake and mound at Northeast corner this survey and Northwest corner Survey No. 5 of said T & P Block 82;

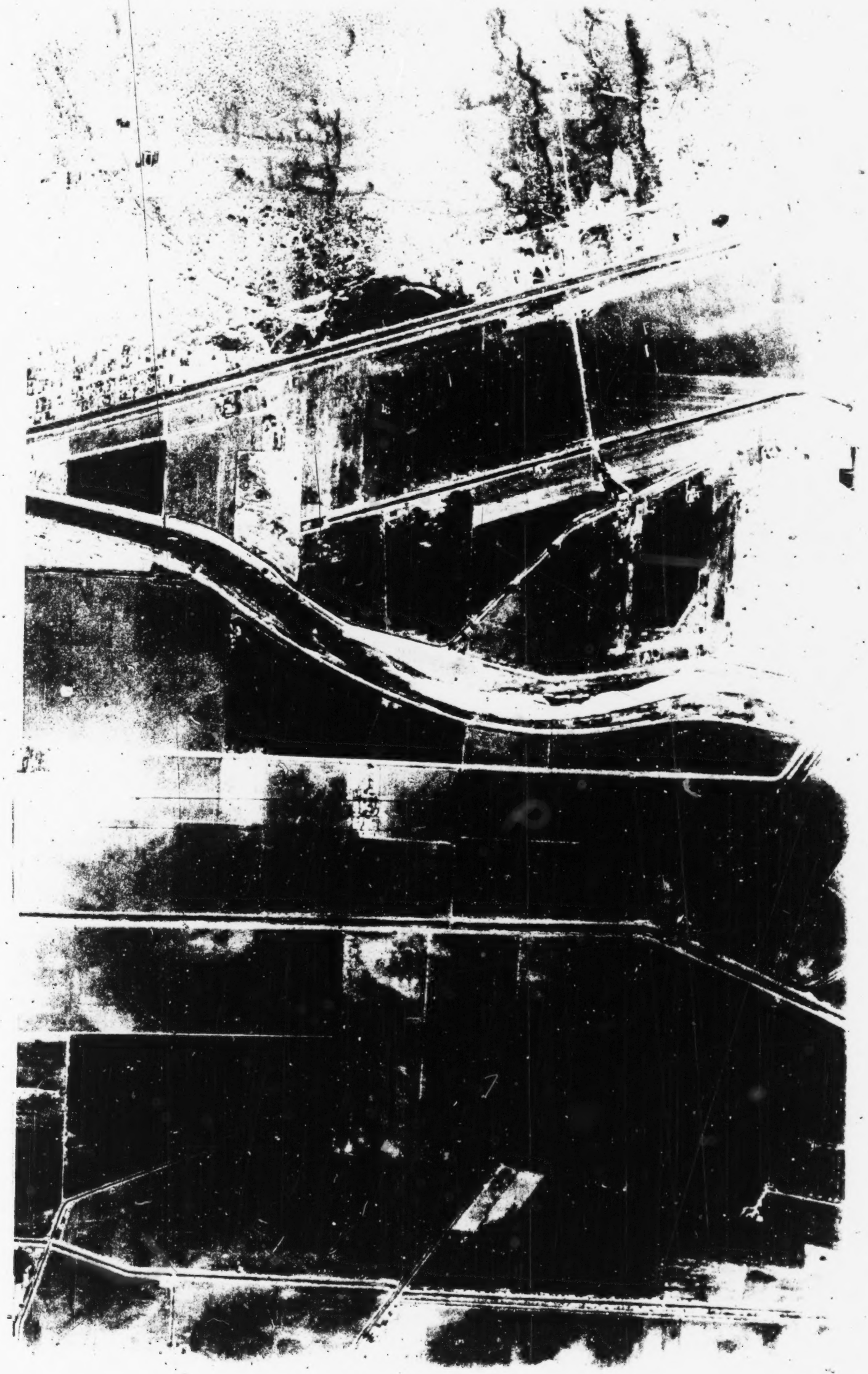
Thence South 0°07′ East with West line of said Survey 5, 1900 varas to Southeast corner this survey, Northeast corner Survey 236 and Southwest corner said Survey No. 5;

Thence West 869.7 varas to stake and mound at original Northwest corner said Survey 236 and Southwest corner this survey;

Thence North 1900 varas to place of beginning.

This Grant shall be subject to any right of way easements, surface leases, or any oil, gas, mineral leases or permits heretofore given by the State on said lands. All mines and minerals and mineral rights, including oil and gas in and under said lands, together with the right to enter thereon for the purpose of exploration and development, are hereby reserved to the State of Texas, and said lands shall be subject to lease by the State for mineral exploration and development in the same manner as is now, or may hereafter be provided for the leasing of unsold Public Free School Lands; provided, however, that the School Land Board or other legally constituted authority offering said lands for lease shall place in said leases such rules and regulations as may be deemed proper by said Board or agency for the prevention of pollution and contamination of the fresh waters, in on, and under said lands.

Hereby relinquishing to It the said The City of El Paso and its successors or assigns forever all the right and title in and to said land heretofore held and possessed by the said State, and I do hereby issue this Letter Patent for the same.



(F-152972)

In Testimony Whereof, I have caused the Seal of the State to be affixed, as well as the Seal of the General Land Office. Done at the City of Austin on the Twenty Sixth day of January in the year of Our Lord One Thousand Nine Hundred and Fifty Six.

(Seal)
(Signed) Allan Shivers,
Governor.

(Seal)
(Signed) J. Earl Rudder,
Commissioner of the General Land Office.

FILED FOR RECORD
IN MY OFFICE
1956 Jan 30 PM 12:17
Raymond L. Telles, Jr.
County Clerk, El Paso County, Texas
(Signed) W. T. Duncan

The State of Texas }
County of El Paso }

I, J. W. Fields, County Clerk in and for El Paso County, State of Texas, do hereby certify that the foregoing is a true and correct copy of the: Patent From: State of Texas To: City of El Paso. Dated the 26th day of Jan., 1956, as the same appears of record in the Deed Records of Said County in Volume 1272 Page 555 thereof.

Given under my hand and seal of office at office in El Paso, Texas, this the 26 day of Nov., A.D., 1963.

J. W. Fields, County Clerk,
El Paso County, Texas.
By: (Signed) Antonio Chavez,
Deputy.

(Seal)

The State of Texas }
County of El Paso }

I, J. W. Fields, County Clerk of El Paso County, Texas, and Antonio Chavez, his deputy, further certify that we are the officers who have the custody of the filed original official records from which these true Certified Copies were made and also we have the legal custody of these filed original official records.

In Testimony Whereof, we have hereto set our hands and affix the seal of said office, this the 26 day of Nov. A. D. 1963.

(Signed) J. W. Fields,
J. W. Fields, County Clerk of
El Paso County, Texas.

(Signed) Antonio Chavez,
Antonio Chavez, Deputy.

(Seal)

AERIAL PHOTO(MOSAIC)N/2 SURVEY 240.

SANUTILLO OVERPASS AERIAL PHOTO MAP, SIMMONS' EXHIBIT NO.39,INCLUDING N/2 NEVILE D.WILDY SURVEY 240,EL PASO COUNTY, TEXAS.

CERTIFIED COPY OF RECORDS OF U.S.DEPT OF AGRICULTURE STABILIZATION AND CONSERVATION SERVICE. FLIGHT DATE: 3-20-62.

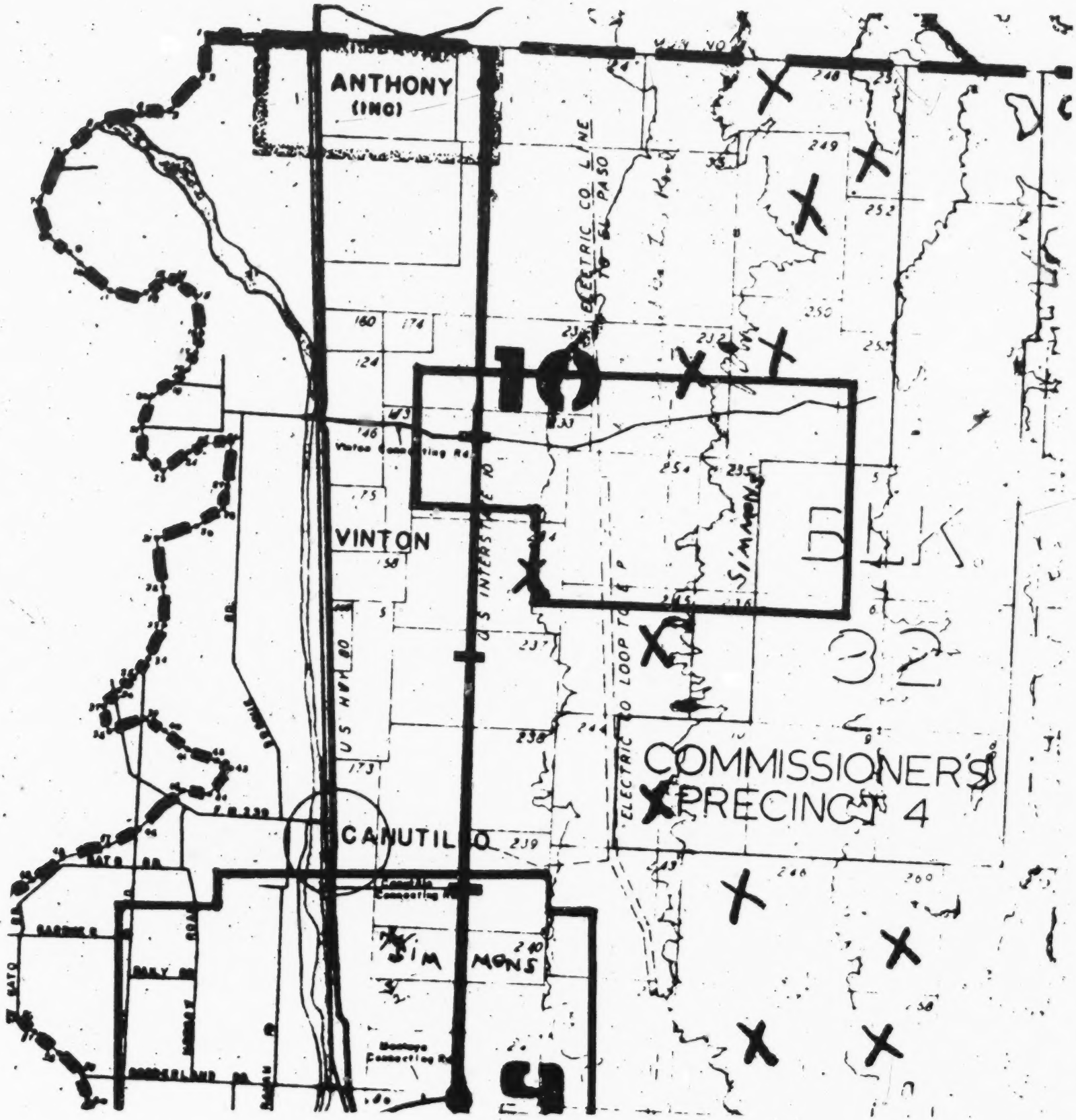
SCALE 1" = 1000'

SIMMONS' EXHIBIT NO.39

(G) "UPPER VALLEY" SECTION OF COUNTY MAP.

A section of the map of El Paso County, made by the Engineering Department of the County and covering the area known locally as the Upper Valley, including the two parcels of land herein involved. The two inset areas are approximately the aerial photos later shown as Simmons' Exhibits Nos. 39, 39A, 40. Some of the other sections included in the 14,000 acres obtained by the Defendant at the same date, and one mile from Survey N/2 240 and adjoining Survey 235, are marked with a large "X" for identification.

Plaintiff's Exhibit No. 38 on Opposite Page.


ANTHONY
(INC)
VINTON
CANUTILLO
SIMMONS
ELECTRIC CO. LINE
TO EL PASO
US INTERSTATE 10
US HWY 80
ELECTRIC TO LOOP
COMMISSIONER'S
PRECINCT 4
DLK
32

"UPPER VALLEY"

SECTION OF MAP OF
EL PASO COUNTY, TEXAS.
SCALE 1" = 5000'
E.P.C.E. = ELPASO COUNTY ENGINEER
REVISED ; JUNE, 1961.

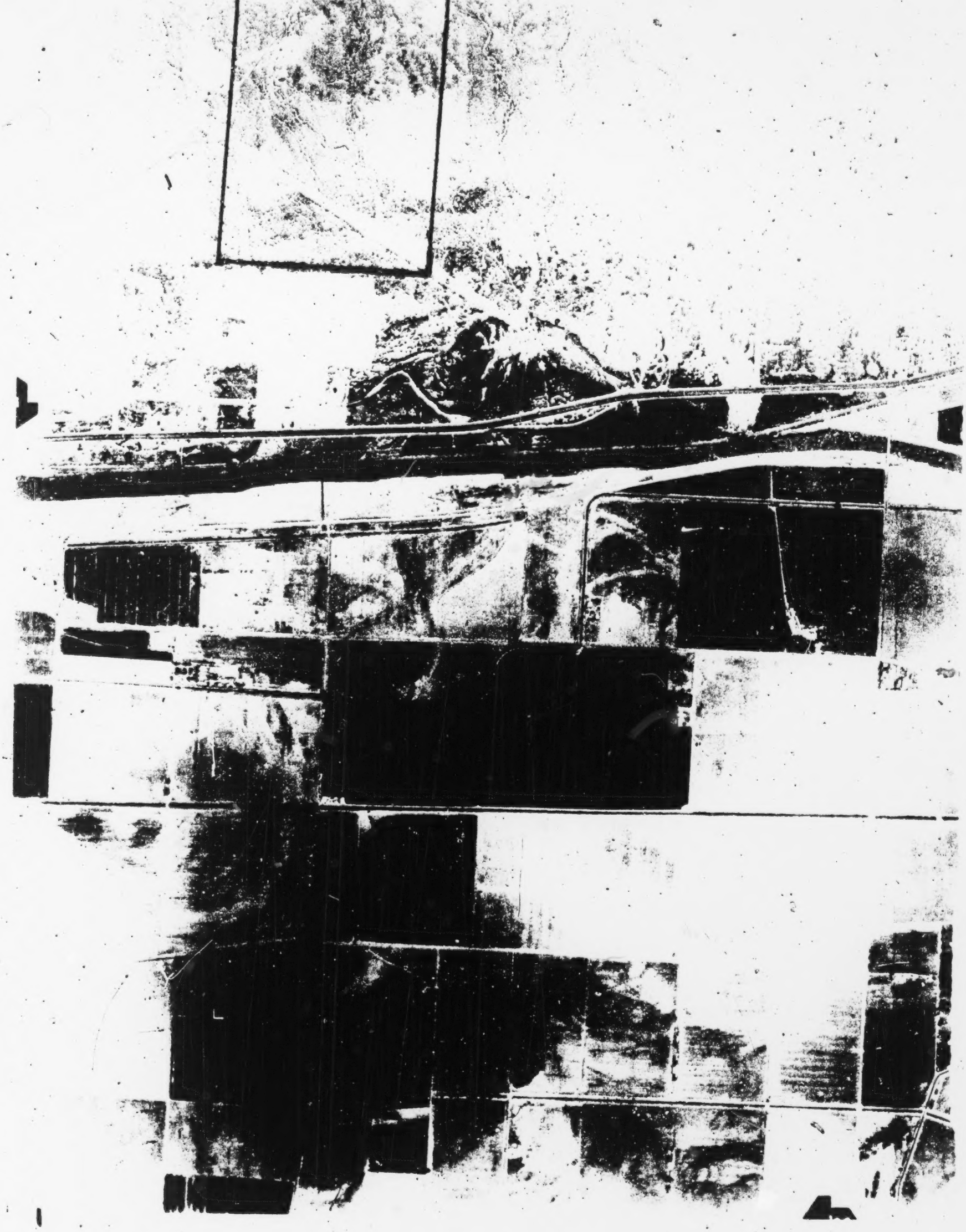
ADDITIONS FOR READY IDENTIFICATION;
SIMMONS, ON SURVEYS N/2 240, 235
X = CLOSE BY SECTIONS, CITY OBTAINED AS PART OF 14000 ACRES, OUTSIDE OF CITY LIMITS.

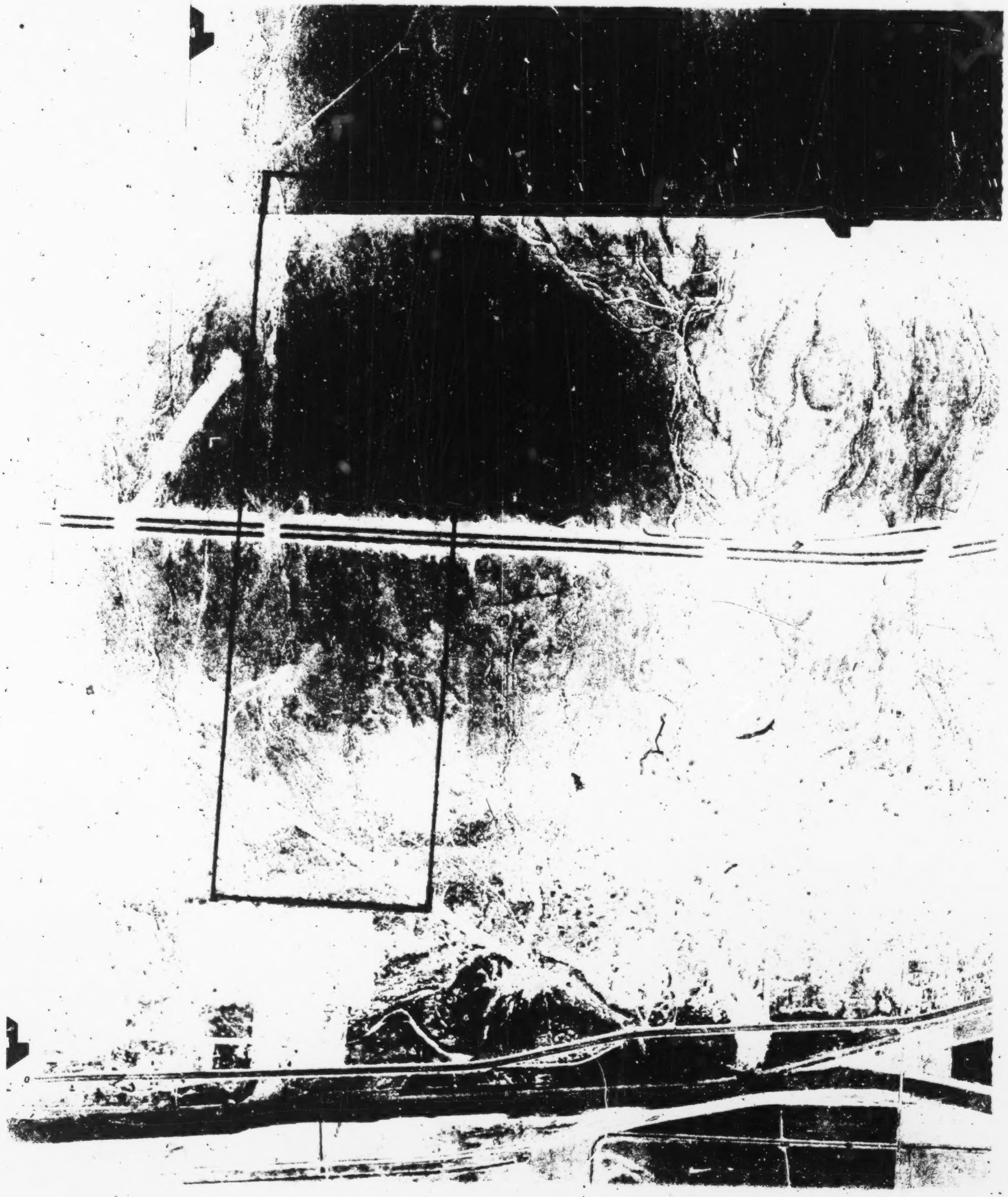
TWO INSETS = AERIAL PHOTOS(MOSAICS) OF EACH PARCEL OF LAND AND SURROUNDING AREAS, SIMMONS EXHIBITS NOS. 39, 40.

(H) AERIAL PHOTO, N/2 SURVEY 240.

A mosaic made of two sectional photographs taken from the air, flight date 3-26-60, and being certified copies of the Records of U. S. Department of Agriculture Stablilization and Conservation Service. Area and surrounding landmarks near the Canutillo connecting road overpass over U. S. Highway Interstate 10, including the inset N/2 Nellie D. Mundy Survey 240, El Paso County, Texas, one of the parcels of land herein involved and marked:

Simmons' Exhibit No. 39 on Opposite Page.





Certification for Simmons' Exhibit No. 39.

No. 418

UNITED STATES OF AMERICA
Department of Agriculture
Washington

I, Orville L. Freeman, Secretary of Agriculture of the United States, pursuant to Title 28, United States Code, Section 1733, do hereby certify that the annexed copy, or each of the specified number of annexed copies, is a true, correct and compared copy of a document in my official custody as hereinafter described: An enlargement from aerial negative DY 9-1AA:168, bearing the date of March 26, 1960, which was secured while photographing El Paso County, Texas, and which is on file in the Western Laboratory, Aerial Photography Division, Agricultural Stabilization and Conservation Service, USDA, Salt Lake City, Utah.

In testimony whereof I have hereunto caused the seal of the Department of Agriculture to be affixed and my name subscribed in the District of Columbia, this 19th day of February, 1964.

(Signed) Orville L. Freeman,
Secretary,

By (Signed) W. H. Tomsheck,
Chief, Western Laboratory, ASCS, USDA.
(Signed pursuant to the authority of 27 F. R. 8958)

(Seal)

P&O 173 (9-62)

No. 420

UNITED STATES OF AMERICA
Department of Agriculture
Washington

I, Orville L. Freeman, Secretary of Agriculture of the United States, pursuant to Title 28, United States Code,

Section 1733, do hereby certify that the annexed copy, or each of the specified number of annexed copies, is a true, correct and compared copy of a document in my official custody as hereinafter described: An enlargement from aerial negative DYO-1AA:202, bearing the date of March 26, 1960, which was secured while photographing El Paso County, Texas, and which is on file in the Western Laboratory, Aerial Photography Division, Agricultural Stabilization and Conservation Service, USDA, Salt Lake City, Utah.

In testimony whereof I have hereunto caused the seal of the Department of Agriculture to be affixed and my name subscribed in the District of Columbia, this 19th day of February, 1964.

(Signed) Orville L. Freeman,
Secretary,

By (Signed) W. H. Tomsheck,
Chief, Western Laboratory, ASCS, USDA.
(Signed pursuant to the authority of 27 F. R. 8958)

(Seal)

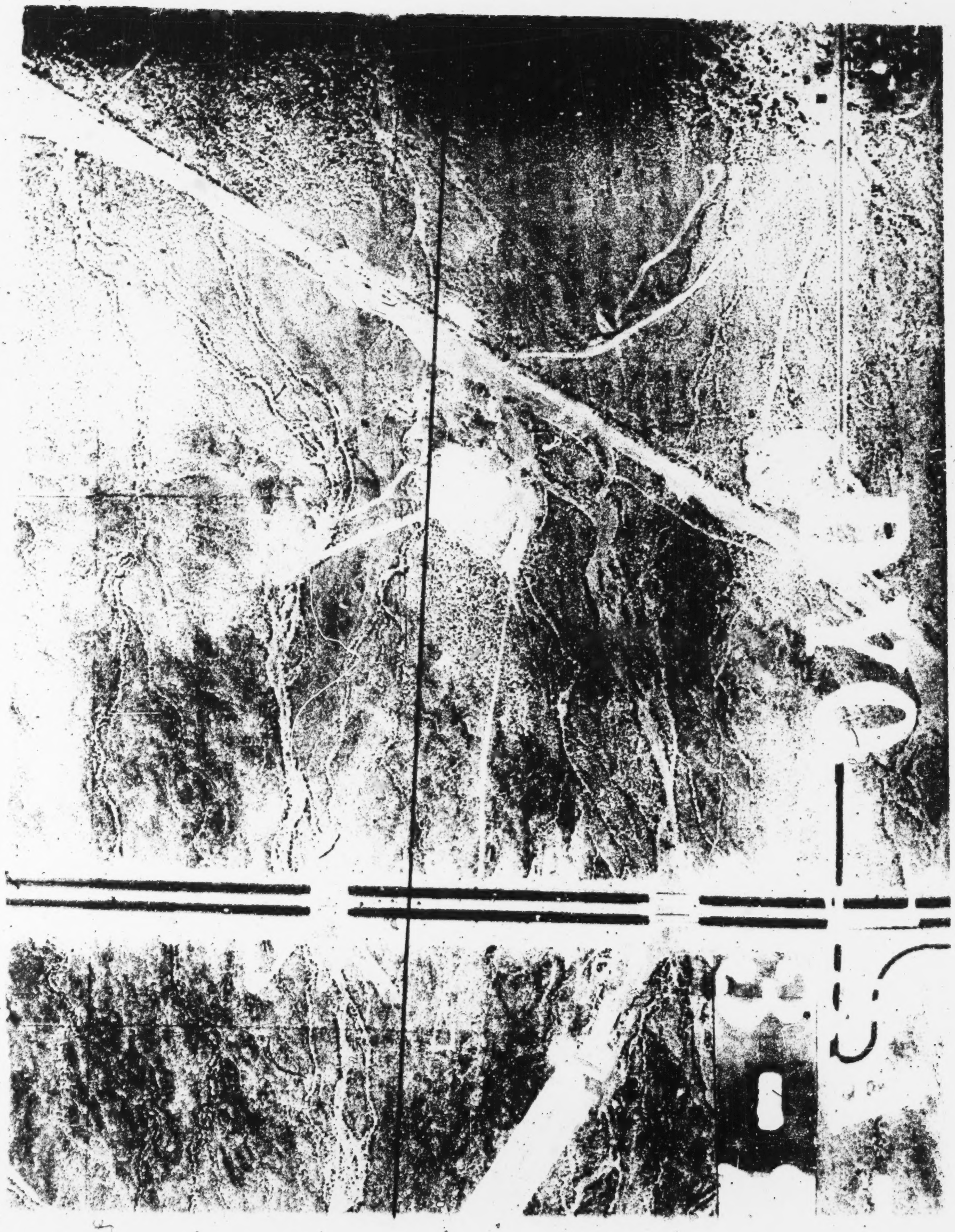
P&O 173 (9-62)

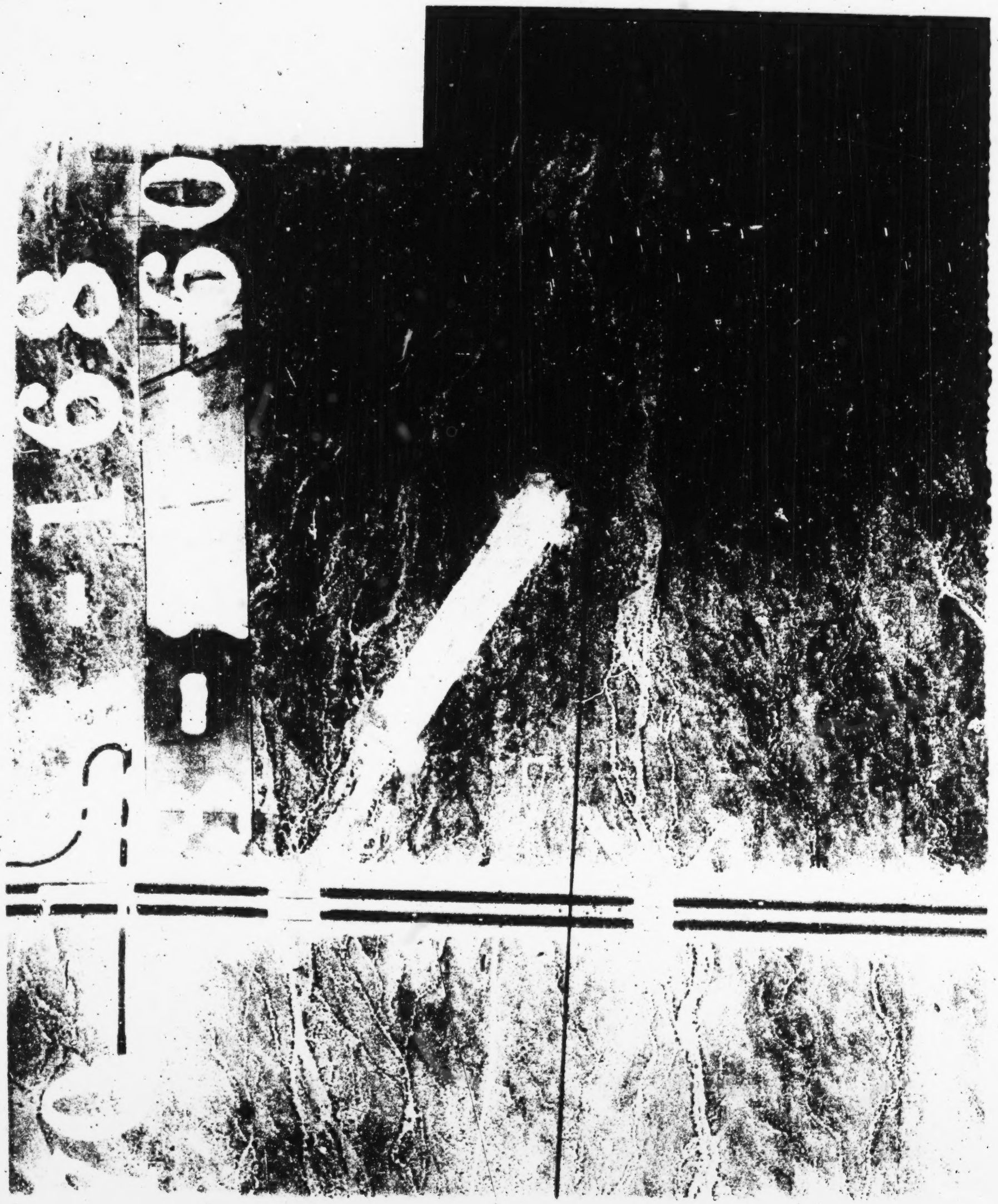
(I) ENLARGEMENT INSET OF AERIAL PHOTO (MOSAIC), N/2 SURVEY 240.

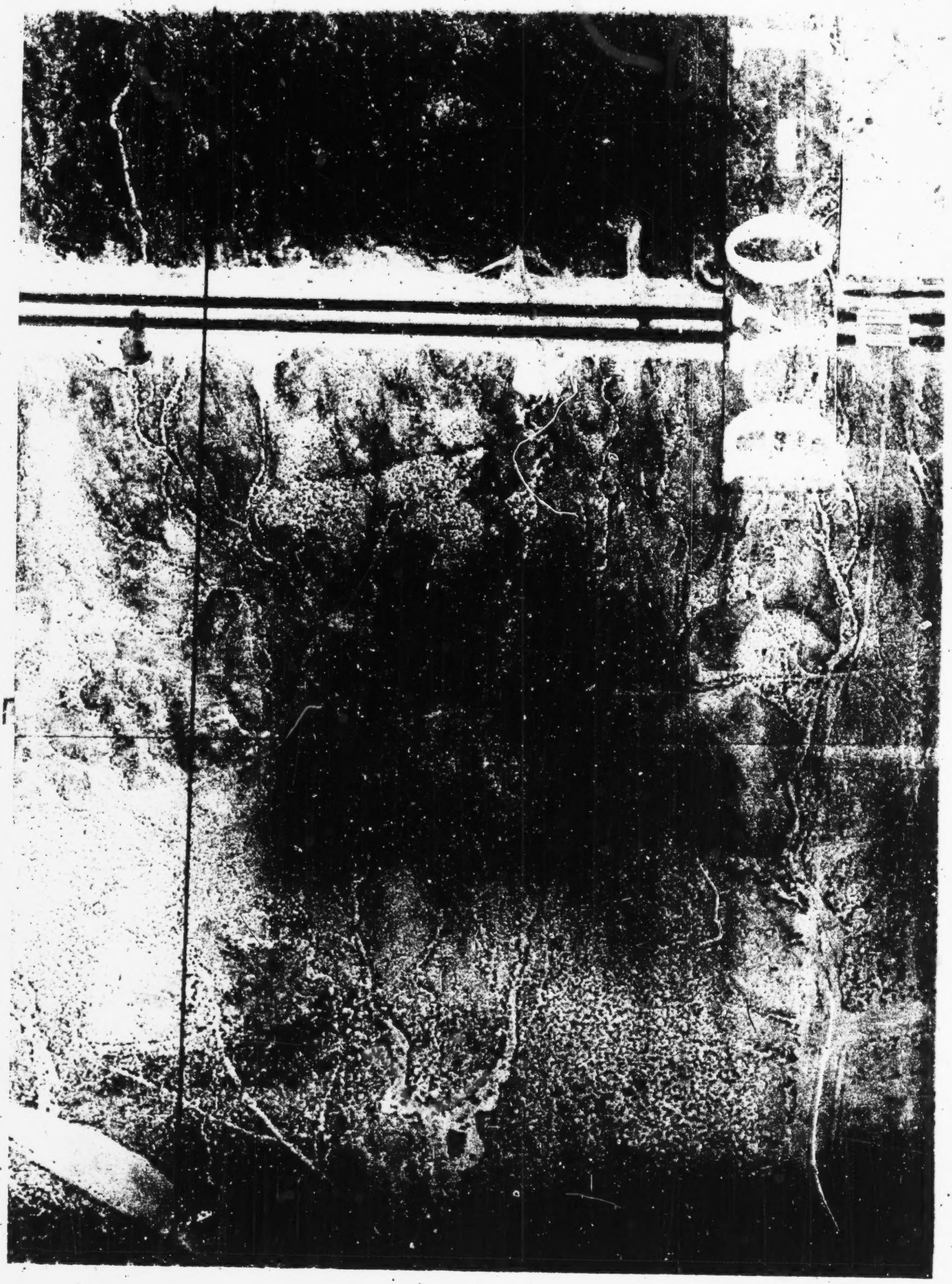
Same as Simmons' Exhibit No. 39, Except Enlarged 2½ Times and Covering Less Surrounding Area. Scale 1" = 400'

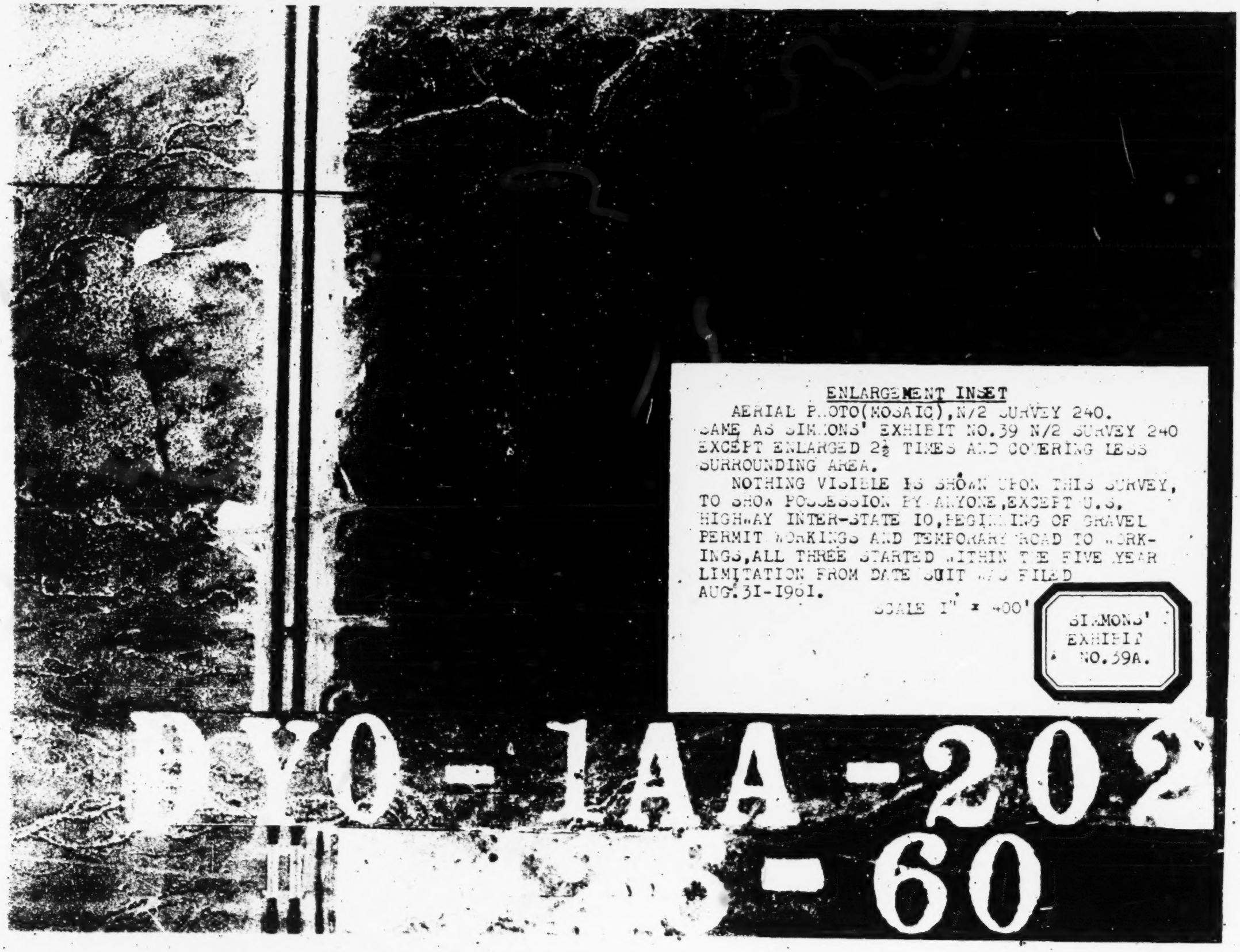
There is nothing visible upon this inset photograph to show possession was taken of this parcel of land, except the U. S. Highway Interstate 10, the gravel permit workings, and temporary road to the gravel workings, none of these were granted for the entire five year period, prior to the filing of this suit, on August 31, 1961.

Simmons' Exhibit No. 39A on the Opposite Page.









ENLARGEMENT INSET

AERIAL PHOTO(MOSAIC),N/2 SURVEY 240.
SAME AS SIMMONS' EXHIBIT NO.39 N/2 SURVEY 240 EXCEPT ENLARGED 2½ TIMES AND COVERING LESS SURROUNDING AREA.

NOTHING VISIBLE IS SHOWN UPON THIS SURVEY, TO SHOW POSSESSION BY ANYONE,EXCEPT U.S. HIGHWAY INTER-STATE 10,BEGINNING OF GRAVEL PERMIT WORKINGS AND TEMPORARY ROAD TO WORKINGS,ALL THREE STARTED WITHIN THE FIVE YEAR LIMITATION FROM DATE SUIT WAS FILED AUG.31-1961.

SCALE 1" = 400'

SIMMONS' EXHIBIT NO.39A.

DX0-1AA-202-60

Certification for Simmons' Exhibit No. 39A.

No. 416

UNITED STATES OF AMERICA
Department of Agriculture
Washington

I, Orville L. Freeman, Secretary of Agriculture of the United States, pursuant to Title 28, United States Code, Section 1733, do hereby certify that the annexed copy, or each of the specified number of annexed copies, is a true, correct and compared copy of a document in my official custody as hereinafter described: An enlargement from aerial negative DYO-1AA-168, bearing the date of March 26, 1960, which was secured while photographing El Paso County, Texas, and which is on file in the Western Laboratory, Aerial Photography Division, Agricultural Stabilization and Conservation Service, USDA, Salt Lake City, Utah.

In testimony whereof I have hereunto caused the seal of the Department of Agriculture to be affixed and my name subscribed in the District of Columbia, this 19th day of February, 1964.

(Signed) Orville L. Freeman,
Secretary,

By (Signed) W. H. Tomsheck,
Chief, Western Laboratory, ASCS, USDA.
(Signed pursuant to the authority of 27 F. R. 8958)

(Seal)

P&O 173 (9-62)

No. 421

UNITED STATES OF AMERICA
Department of Agriculture
Washington

I, Orville L. Freeman, Secretary of Agriculture of the United States, pursuant to Title 28, United States Code,

Section 1733, do hereby certify that the annexed copy, or each of the specified number of annexed copies, is a true, correct and compared copy of a document in my official custody as hereinafter described: An enlargement from aerial negative DYO-1AA-202, bearing the date of March 26, 1960, which was secured while photographing El Paso County, Texas, and which is on file in the Western Laboratory, Aerial Photography Division, Agricultural Stabilization and Conservation Service, USDA, Salt Lake City, Utah.

In testimony whereof I have hereunto caused the seal of the Department of Agriculture to be affixed and my name subscribed in the District of Columbia, this 19th day of February, 1964.

(Signed) Orville L. Freeman,
Secretary,

By (Signed) W. H. Tomsheck,
Chief, Western Laboratory, ASCS, USDA.
(Signed pursuant to the authority of 27 F. R. 8958)

(Seal)

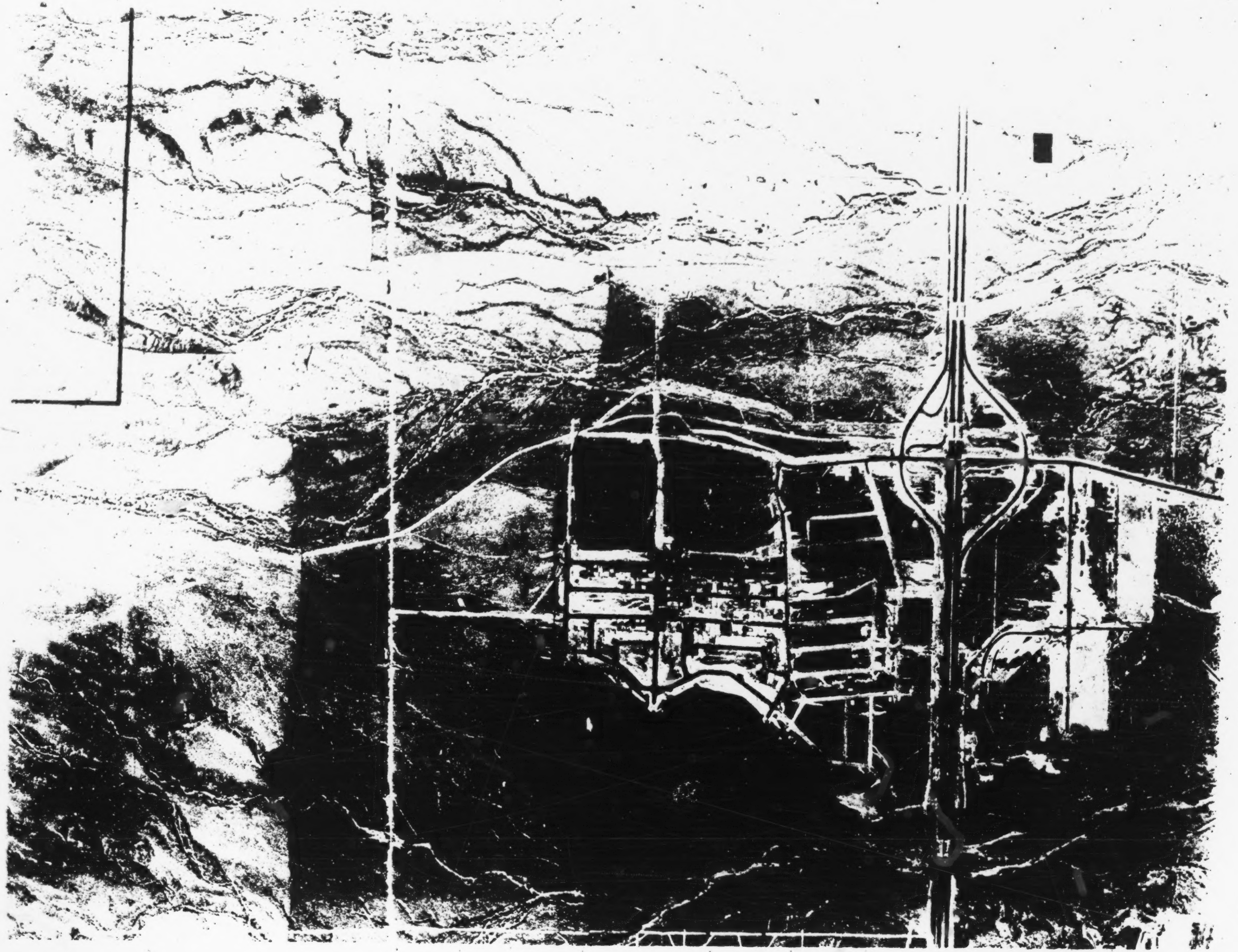
P&O 173 (9-62)

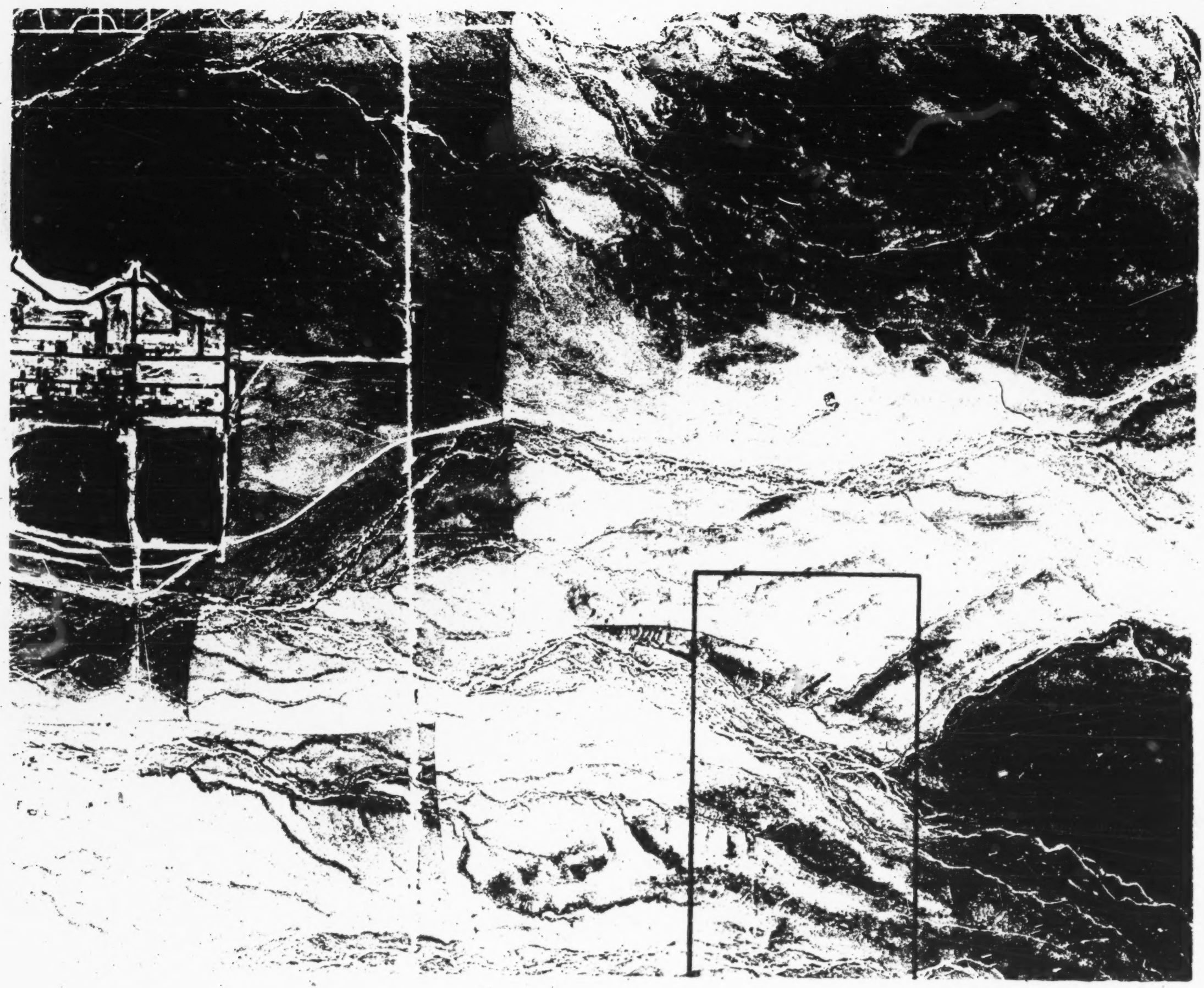
(J) AERIAL PHOTO. SURVEY 235.

A mosaic made of four sectional photographs taken from the air, flight date 8-10-63, part of a photographic map of El Paso County, Texas, photographed by Midwest Aerial Photographic Service, Inc. Area and surrounding landmarks near the Vinton connecting road overpass over U. S. Highway Interstate 10, including the inset Laura E. Mundy Survey 235, one of the parcels of land herein involved and marked: Simmons' Exhibit No. 40.

There is nothing visible upon this inset parcel of land, Laura E. Mundy Survey 235, to show any possession.

Simmons' Exhibit No. 40 on the Opposite Page.





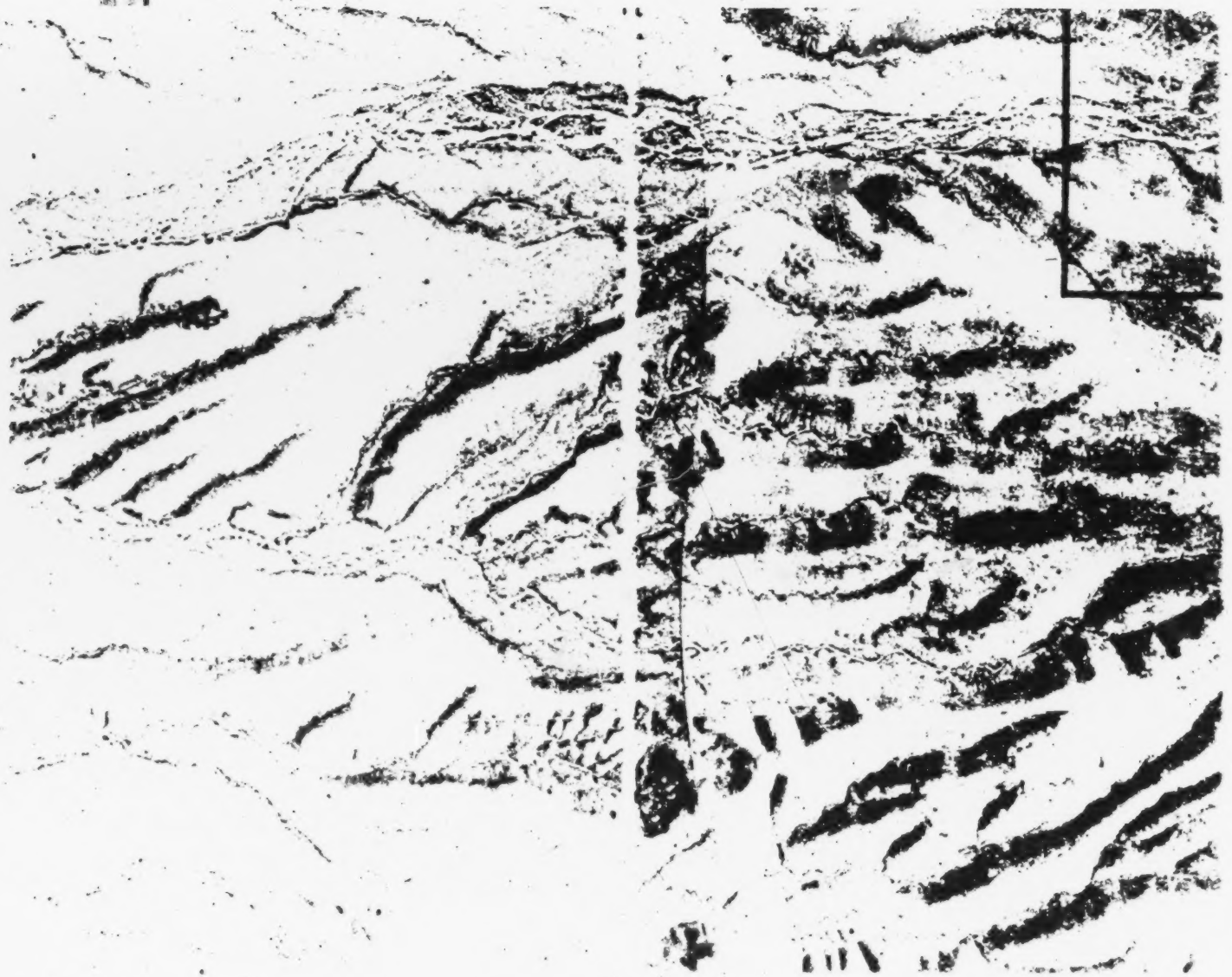
AERIAL PHOTO(MOSAIC)SURVEY 235.

VINTON OVERPASS AERIAL PHOTO MAP, SIMMONS' EXHIBIT NO.40, INCLUDING LAURA E.MUNDY SURVEY 235.

A SECTION OF THE PHOTOGRAPHIC MAP OF EL PASO COUNTY, TEXAS, MADE BY MIDWEST AERIAL PHOTOGRAPHIC SERVICE, INC.
FLIGHT DATE: 8-10-63.

SCALE I" = 1060', approximately.

SIMMONS' EXHIBIT NO. 40



II. THAT EACH OF THE FOLLOWING STATEMENTS IS TRUE.

1. That the City has built no buildings on these two separate parcels of involved lands.

2. That the City has put up no fences on these lands.

3. That the City has made no visible improvements of any kind on these lands, which have remained on them, for a continuous 5 year period between the dates of January 26, 1956, the date the City's purported patents were issued, and August 31, 1961, the date this suit was filed.

4. That the City has not cultivated these lands.

5. That the City has made no complete survey on all four sides of either of these two parcels of land.

6. That when the City had made any partial survey, if any, they were all made within the 5 year period, before the filing of this suit on August 31, 1961.

7. That the City has paid no taxes on these lands.

8. That the City has put nothing on these two particular involved parcels of land with the name of the City of El Paso or the name of the Public Service Board including signs, which have remained on them for a 5 year period between dates the purported Patents were issued and the date this suit was filed.

9. That the posted signs prohibiting Trespassing, which did include the names of the City of El Paso or the Public Service Board, upon such signs, were put on the other portions of the 14,000 acres of land, but

not kept upon these two specific parcels of land for the 5 year continuous period involved.

10. That the City has put nothing on these two particular parcels of land, which has remained there for the continuous 5 year period, visible to a passerby, which would show that the City of El Paso owned these lands.

11. That the City has put nothing on these particular two parcels of land which would show that the City remained in visible possession of these two parcels of land for a five year period, between January 26, 1956 and August 31, 1961.

12. That the grant of 16.46 acres for U. S. Highway Interstate 10, which was built through the approximate center of N/2 of Survey 240, was made within the 5 year period before the filing of this suit on August 31, 1961.

13. That the gravel permit granted for 20 acres on February 2, 1961, to the County of El Paso, on N/2 of Survey 240, was granted within the 5 year period before the filing of this suit on August 31, 1961.

14. That the 22 foot road granted to the County of El Paso February 2, 1961, from the northwest corner of the N/2 of Survey 240 to the gravel permit, including .56 of an acre, was granted within the 5 year period before the filing of this suit on August 31, 1961.

15. That this road has not been built by the County.

16. That the City never gave actual notice to Simmons that it was claiming title or possession of

the two parcels of land until after Plaintiff's suit was filed on August 31, 1961.

17. That the City exercised no hostility toward Greenberry Simmons, the record owner, before the filing of this suit on August 31, 1961.

18. That the City had never heard of Greenberry Simmons, the record owner, before this suit was filed.

19. That the City thought these lands were owned by the State of Texas when it received the purported patents on January 26, 1956 and up until this suit was filed.

20. That the City exercised no hostility toward any one with reference to these involved lands, for a continuous full 5 years period between January 26, 1956 and August 31, 1961.

21. That the City drilled no water wells on these two parcels of land between January 26, 1956 and August 31, 1961.

22. That the City, since it obtained its purported patents on January 26, 1956, has spent very little, if any, money on these two particular parcels of land, excluding the rest of the 14,000 acres and exclusive of attorney fees.

23. That the printed record in this suit was printed by the printers for the Clerk of the Court of Appeals for the Fifth Circuit and returned by him, with the original Record to this Court, includes all of the records filed in this Court before it was appealed.

24. That the Appellant's Printed Brief, which was also returned by the Clerk of the Court of Appeals

with the printed record in this case, was the same Printed Brief for the Plaintiff, which was printed for the District Court here before it was appealed, except there was added, (a) Printed Record page numbers for the Court's reference, (b) Rider Sheet, (c) Brief of the Argument, pp. 16b-16i, (d) Specification of Errors, p. 16a.

25. That the Court of Appeals for the Fifth Circuit, in this same suit, between the same parties, in this trespass to try title suit, has held that Simmons is the record owner of these two parcels of land.

26. That at the time the City obtained its purported sale from the authorization of the State, through its Legislative Act of 1955, the State had a contract with equitable recorded owner Simmons, to deliver the naked legal title to him upon the payment of the balance of the interest and principle.

27. That the Court of Appeals for the Fifth Circuit in this suit has held that this purported sale to the City of these same two parcels of land, which had already been sold is illegal and void.

28. That this illegal and void sale is the basis of the City's two purported patents which are the only "deed or deeds duly registered" it has to fulfill this requirement of Article 5509.

29. That when the State Legislature passed the Act of 1955 and made the authorization of this purported sale, to the City, of these two parcels of land, that the purported sale was made without any due compensation whatsoever to Simmons.

30. That when the State Legislature authorized this purported sale to the City no prior actual notice was given to Simmons.

31. That the reason this purported sale was illegal and void was that it was an unconstitutional sale.

32. That by claiming adverse possession under the 3 year Statute, Art. 5507 and the 5 year Statute, Art. 5509, the City is also bound by the definition of "adverse possession" as set out in Art. 5515: "'Adverse Possession' is an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another."

33. That in Texas, where claimant has failed in its adverse possession claim against a record owner of land, in the same suit between the same parties, the record owner cannot be guilty of laches.

34. That the City, as claimant, must show that the record owner had actual notice of its adverse possession claim, in order for the record owner to be guilty of laches.

35. That Plaintiff's Exhibit No. 38, a section of the County Engineer's map of El Paso County, with added explanations and added insets, is the area northwest of El Paso, including Canutillo and Vinton, Texas, known locally as the "Upper Valley."

36. That the inset area at the bottom of Plaintiff's Exhibit No. 38 covering the Canutillo connecting road overpass over U. S. Highway Interstate 10, is approx-

imately the area covered by the aerial photographs, Simmons' Exhibits Nos. 39, 39A.

37. That the inset area at the top of Plaintiff's Exhibit No. 38 covering the Vinton connecting road overpass over U. S. Highway Interstate 10, is approximately the area covered by the aerial photograph, Simmons' Exhibit No. 40.

38. That the rectangular inset tracings within the Canutillo overpass aerial photographs, Simmons' Exhibits Nos. 39, 39A, is approximately the area covered by N/2 Nellie D. Mundy Survey 240.

39. That the rectangular inset tracing within the Vinton overpass aerial photograph, Simmons' Exhibit No. 40, is approximately the area covered by Laura E. Mundy Survey 235.

40. That if the State cannot deliver these two parcels of land to the City, under its purported sale, the City may get back its paid purchase price from the State under Art. 5411.

Signed: HAROLD S. LONG,
HAROLD S. LONG,
El Paso National Bank Bldg.,
El Paso, Texas,

Signed: GREENBERRY SIMMONS,
GREENBERRY SIMMONS,
Kentucky Home Life Bldg.,
Louisville, Kentucky 40202,

Attorneys for the Plaintiff.

March 31, 1964.

PROOF OF SERVICE.

I, Greenberry Simmons, one of the attorneys for Greenberry Simmons, Plaintiff herein, hereby certify that on the 31 day of March, 1964, I served copies of the foregoing Request for Admission, on the Defendant, City of El Paso, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, certified to the respective attorneys of record as follows:

To Thornton Hardie, Esq.,
To Morris A. Galatzan, Esq.,
To William J. Mounce, Esq.,
Attorneys for Defendant, City of El Paso,
El Paso Natural Gas Company Bldg.,
El Paso, Texas.

Signed: GREENBERRY SIMMONS,
Attorney for Greenberry Simmons,
Kentucky Home Life Bldg.,
Louisville, Kentucky 40202.

ACCRUED ACTION SINCE C A 5 DECISION.

The City Has Made No Application or Motion for Stay in the Lower Courts, Under Supreme Court Rule 18 (1) or Any Other Rule.

After the mandate in this case, September 26, 1963 went to the District Court to determine City's purported defenses of adverse possession and laches, the new District Judge exercised his discretion and sent notices, February 7, 1964, including pre-trial set for April 20, 1964, at 2:00 p.m.

Excerpts from these notices are as follows:

"IN THE UNITED STATES DISTRICT COURT
For the Western District of Texas
El Paso Division

Homer Thornberry
United States District Judge

P. O. Box 62
El Paso, Texas 79940
February 7, 1964

NOTICE

TO ALL LAWYERS HAVING CASES ON THE DOCKET OF THE UNITED STATES DISTRICT COURT AT EL PASO, TEXAS:"

"* * * pre-trials must be held in *every civil case*, whether it is for preliminary relief or otherwise, * * *."

"Copies of all papers * * * must be furnished to the Court no later than ten (10) days before April 13, 1964."

"Pre-trial Conference Schedule"
"Monday, April 20, 1964"
"2:00 p.m., * * *"
"2334 Simmons vs. City of El Paso"

Under the above circumstances and to comply with the same, Simmons on April 1, 1964, filed his printed "Plaintiff's Request for Admissions under Rule 36", dated March 31, 1964, covering the City's purported defenses of adverse possession and laches.

The City answered on April 8, 1964. The answer is filed herewith. The City failed to answer under oath and also failed to specifically answer the first 15 admissions requested, pp. 41-42, as required by Rule 36 F.R. Civ. P. If deemed to be answered in the affirmative, it would seem the City has not taken visible adverse possession for the required five year continuous period.

The City of El Paso's Objection to Request for Admissions Was Filed April 8, 1964.

Which is as follows:

IN THE UNITED STATES DISTRICT COURT
For the Western District of Texas
El Paso Division

Civil No. 2334

GREENBERRY SIMMONS, - - - - - - - *Plaintiff,*

vs.

CITY OF EL PASO, - - - - - - - - *Defendant.*

OBJECTION TO REQUEST FOR ADMISSIONS.

Comes now the Defendant, CITY OF EL PASO, and objects to the Request for Admissions heretofore served upon it by the Plaintiff, GREENBERRY SIMMONS, and in support thereof would respectfully show the following:

I.

The appeal of the above case is now pending before the United States Supreme Court. Until the Supreme Court has acted upon the appeal, any request for admissions is premature.

II.

The request that certain documents are genuine should not be allowed because Defendant has not been furnished a copy of documents A, B, C, D, E and F. Further, the Defendant would show that it has no way of knowing whether the documents under Items G, H, I and J of Plaintiff's Request for Admissions are genuine. The information necessary to enable the Defendant to either admit or deny the genuineness of such documents is not readily available; consequently, the Defendant should not be required to respond to such requests.

III.

Items 16, 17, 20, 22, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 40 of Plaintiff's Request for Admissions call for conclusions of law rather than an admission of fact; therefore, the Defendant should not be required to respond thereto.

IV.

The facts requested under Items 23, 24, 35, 36, 37, 38 and 39 of Plaintiff's Request for Admissions are not within the knowledge of the Defendant, CITY OF EL PASO. The information necessary to enable the CITY OF EL PASO to either admit or deny the correctness of the statements is not readily available. Further, said requests call for conjecture or guesswork on the part of the CITY OF EL PASO; consequently, the Defendant should not be required to respond to such requests.

WHEREFORE, premises considered, the Defendant, CITY OF EL PASO, prays that said Request for Admissions be suspended pending the decision of the United States Supreme Court and if for any reason the decision of the United States Court of Appeals for the Fifth Circuit is upheld by the United States Supreme Court, that an order be entered that Defendant need not answer the request for genuineness of documents nor reply to Items 16, 17, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39 and 40 of the Plaintiff's Request for Admissions.

Respectfully submitted,

HARDIE, GRAMBLING, SIMS & GALATZAN,
By William J. Mounce,
Attorneys for the Defendant,
City of El Paso.

I, William J. Mounce, certify that I have this 8th day of April, 1964, mailed a copy of the foregoing to Harold Long, Attorney of record for the Plaintiff, Greenberry Simmons.

Signed: WILLIAM J. MOUNCE

Office-Supreme Court, U.S.
FILED
FEB 8 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964

No. 38

CITY OF EL PASO, - - - - Appellant,

versus

GREENBERRY SIMMONS, - - Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

GREENBERRY SIMMONS,
Individually as Petitioner,
Respondent, (Appellee).

GREENBERRY SIMMONS,
Kentucky Home Life Bldg.,
Louisville, Kentucky.
Counsel for Respondent (Appellee)

February 6, 1965.

IN THE

Supreme Court of the United States

October Term, 1964

No. 38

CITY OF EL PASO, *Appellant,*

v.

GREENBERRY SIMMONS, *Appellee.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

Petitioner, Greenberry Simmons, Respondent (Appellee), prays that this Court, under its Rule 58, grants rehearing of its majority decision of January 18, 1965, reversing the Court of Appeals decision. Petitioner also, under First Amendment of the Constitution, "petitions the government for the redress of grievances."

The necessary cause of this petition is that the Court's majority opinion directs the major part of its attention to new matters, never before ever brought up in this suit and that it

goes outside of the Record to do so, which makes it imperative, in fairness to all, for the Court to reconsider their position in the light of the first reply to these new matters.

REASONS FOR GRANTING REHEARING, PETITION AND FOR CORRECTION OF MISTAKE OF FACT

1. The majority opinion of the Court permits the taking permanently of the private property rights of Simmons for public use without any just compensation, whatsoever, in violation of the rights given Simmons by the Constitution of the United States, Fifth Amendment, Fourteenth Amendment and Article 1, Section 10.

2. The Court's majority opinion based its decision on judicial notice which conflicts with the "Transcript of Record" in this suit.

3. The Court's majority opinion has based its "reasonable and appropriate" judgment on its Judicial Notice of the General Land Office Reports by former General Land Commissioner for the State of Texas, Bascom Giles,[1] who was a convicted felon and spent several years in prison for land frauds in this very office and was the same Giles who refused to reinstate this land, instead of basing its opinion of "reasonable and appropriate" judgment on the Transcript of Record filed in this suit, composing of certified copies of the records of the General Land Office for the State of Texas and County Clerk's office, admitted by the City to be genuine.

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[1] Bascom Giles, General Land Commissioner, State of Texas, 16 years, Jan. 1939-Jan. 1955. All such Reports cited during this period, where the Court's majority opinion goes outside of the Record and cites Giles' Reports 9 times, pages 13, 14 (two times cited), 15 (four times cited), 16, 18. At the same time failed to cite a single page number of this Record, made up of certified copies of official records and documents, and admitted as genuine by the Appellant (Petitioner).

If the members of the Court's majority choose to go outside of this Record by Judicial Notice or otherwise and rely on Bascom Giles' Reports and permit anyone to take Simmons' property rights permanently without paying for them — to say the least, these majority members of the Court, may have been illadvised.

The substantial cause of the title conflicts and confusion which this Court is trying to "reasonably and appropriately" solve, is the States' own fault, because its Legislatures have passed all these conflicting Acts, since the date of these two Contracts in 1910, on the recommendation of Bascom Giles and others like him looking after their personal interests, [which is resulting in the moral fiber of this great land of ours fast going down the drain] and not the failure of these vendees who could not pay their interest until later but were permitted to pay up back interest at any time before the State resold their lands.

4. The Court may desire to correct a substantial mistake of fact stated in its opinion. In speaking of what the settler's Glenn and Kilpatrick and their vendees, including Simmons, did to get the lands in this suit, it said:

> "All this for a nominal down payment". Court's majority opinion, page 17, second line from bottom.

Whereas this Transcript of Record clearly shows that the "OBLIGATION"[2] itself says settlers Glenn and Kilpatrick or their vendees, including Simmons, had to build their homes with their own money and reside upon these homesites for

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[2] "* * * such lands shall be subject to sale, but to actual settlers only * * *. And if he or his vendor has already resided upon his home section for three years, * * *, the additional lands purchased may be patented *at any time*" (Emphasis added). Appendix D For Appellee Simmons, pp. 55-56, all of Art. 4218f, ch. 129, Act of May 19, 1897; R. 67, 43, "OBLIGATION" as heading in the middle of the page.

three years which Glenn and Kilpatrick did. This was the hardest part of their "OBLIGATION" to perform and this record shows that they did it. R. 46-48, 48-51, 69-72.

This Record shows that settlers Glenn and Kilpatrick and their vendees held possession of these lands for over thirty (30) years and paid interest on them and to say that "all this for a nominal down payment" is clearly a substantial mistake which goes to the very heart of this Record and of course will be corrected.

CONCLUSION

For the reasons set forth above and for the correction of the stated mistake of fact, it is respectfully urged that a rehearing be granted and further consideration be given to both Court's majority and minority opinions and that the Court of Appeal's decision be affirmed instead of reversed.

Greenberry Simmons further prays under the rights given him by the First Amendment to the Constitution that his petition to his "government for redress of grievances" be granted.

On Jan. 18, 1965 before the Court's majority decision (opinion)[3] was announced Greenberry Simmons owned these 620.65 acres of land. If this decision is allowed to stand without alteration Simmons, with the highest respect for the Supreme Court, has stated clearly and precisely that this decision has taken permanently his private property rights for public use without any just compensation, whatsoever, in violation of several sections of the Constitution.

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[3] Both majority and minority opinions, 33 U. S. Law Week 4126, Jan. 19, 1965, Vol. 33 No. 27.

As an American citizen and for a lifetime of free service he has rendered the profession of law and hopes for the welfare of mankind—it is earnestly and respectfully suggested that each of these eight Justices individually and personally direct his attention to the consideration of this petition and prayer, as this is the first reply to completely new matter raised by the Court outside of this Record in this suit.

Respectfully submitted,

GREENBERRY SIMMONS,
Individually as Petitioner,
Respondent, (Appellee).

GREENBERRY SIMMONS,
Kentucky Home Life Building
Louisville, Kentucky 40202
Counsel for Respondent (Appellee.)

February 6, 1965.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court and of the First Amendment to the Constitution.

GREENBERRY SIMMONS,
Counsel for Respondent (Appellee.)

PROOF OF SERVICE

I, Greenberry Simmons, one of the Attorneys for Greenberry Simmons, Respondent (Appellee) herein, and a member of the Bar of the Supreme Court of the United States, hereby Certify that on the 6th day of February, 1965, I served copies of the foregoing Petition for Rehearing for the Respondent (Appellee) Simmons on the Appellant (Petitioner), City of El Paso, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to the respective Attorney of record as follows:

To William J. Mounce, Esq.
Attorney for Appellant (Petitioner)
City of El Paso
El Paso Natural Gas Company Bldg.
El Paso, Texas

Greenberry Simmons
Attorney for Greenberry Simmons,
Kentucky Home Life Building,
Louisville, Kentucky, 40202